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No.

IN THE
Supreme Court of the United States

JERMAINE BONEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a felon disqualified by federal statute from jury service deliberately lies under oath to conceal his felon status and serves on a jury that convicts a defendant, must the defendant demonstrate "actual bias" in order to obtain a new trial?

2. Whether a trial court's refusal to allow a defendant to obtain information or evidence from other jurors prevented a fair and adequate evidentiary hearing concerning the effect of a felon deliberately lying to become a member of the jury?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the name of all the parties.

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PETITION FOR A WRIT OF CERTIORARI

Jermaine Boney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Two of the three opinions of the court of appeals in *United States v. Boney*, (*Boney I*) (Pet. App. 31a) and (*Boney II*) (Pet App. 18a), are reported at 977 F.2d 624 (D.C. Cir. 1992) and 68 F.3d 497 (D.C. Cir. 1995) respectively. The third opinion of the court of appeals (Pet. App. 1a) (*Boney IV*) is unreported. The opinion of the district court (Pet. App. 3a) (*Boney III*) is reported at 97 F. Supp. 2d 1 (D.D.C. 2000).

JURISDICTION

The judgment of the court of appeals was filed on December 4, 2000. This Court has jurisdiction based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES

The Sixth Amendment of the Constitution (Pet. App. 74a), pertinent provisions of the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §§ 1861-1871 (Pet. App. 75a), the Federal Rules of Evidence (Pet. App. 79a), and the United States District Court for the District of Columbia Local Criminal Rules (Pet. App. 79a) are reproduced in the appendix to this petition.

STATEMENT OF THE CASE

A felon deliberately lied at *voir dire* to conceal his felon status and served on a jury that convicted petitioner. The juror was unqualified to serve under federal law because of the felony conviction. The failure to grant a new trial violated petitioner's right to an impartial jury under federal law and the Sixth Amendment.

1. Deliberate Deception by the Felon-Juror in Order to Become a Juror

Mr. J[1] pled *nolo contendere* in 1985 in California to a charge of grand larceny, a felony punishable by imprisonment for more than one year. He served nine months of his one year sentence and was released on parole. The term of his parole was five years. He moved to the District of Columbia.

In early 1990, Mr. J received from the Jury Office of the United States District Court for the District of Columbia a Juror Qualification Questionnaire, the standard form sent to all prospective jurors to determine if they can be called for jury service. *See* 28 U.S.C. § 1869(h) (describing Questionnaire). The Questionnaire posed three questions addressing criminal behavior by the prospective juror. Question 5 inquired if the person now has criminal charges pending where the sentence could exceed one year. Question 6 asked:

> Have you ever been convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison? ____ Yes _____No

Question 7 indicated:

> (Answer this question only if you answer Question #6 "yes") Were your civil rights restored? (If "Yes", explain on reverse side) ____ Yes _____ No

If the answer to 5, 6, or 7 was yes, the front of the form instructed the person to give more information on the reverse side of the form. The reverse side of the form indicated that if

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[1] In the *Boney II* opinion, the court of appeals used Mr. J as a pseudonym to refer to the felon-juror. Pet. App. 18a. This Petition adopts that convention even though other publically available sources have identified the felon-juror by name. *See United States v. Boney*, 1994 WL 907463 (D.D.C. Aug. 18, 1994), *rev'd and remanded*, *Boney II*, Pet. App. 18a.

a person had answered "Yes" to Questions 5 or 6, the person should provide information about the date of the offense, the date of the conviction (or pending charge), the sentence imposed, and the name of the court. In addition, if the person answered "Yes" to Question 7, the person should explain and provide evidence that civil rights had been restored. The text on the reverse also repeated the explanation that the disqualification applies if the crime charged included a possible penalty of imprisonment for more than one year, even if a sentence of that length was not imposed. Immediately above the signature line of the form, the following printed legend appeared: "I declare under penalty of perjury that all answers are true and correct to the best of my knowledge and belief." Mr. J signed the form on April 12, 1990 and mailed it to the Jury Office. In response to Question 6, Mr. J falsely checked "No." Surprisingly, despite the clear parenthetical instruction to answer Question 7 only if the answer to Question 6 was "yes," Mr. J responded "Yes" to Question 7. This statement was also false, as Mr. J's civil rights had not been restored. Mr. J did not provide any information on the reverse side of the form.

The Jury Office concluded that Mr. J was available for service as a juror. Initially confused by Mr. J's response to Question 7 despite his negative response to Question 6, the Jury Office telephonically contacted Mr. J about the anomaly. Mr. J informed the Jury Office that he had made a mistake in responding to Question 7. Thus, the felon lied again to the district court's Jury Office. Deceived by the lies, the Jury Office summoned Mr. J for jury service in May 1990.

During *voir dire*, the district judge twice asked the three-part question commonly used in the district court at the commencement of *voir dire* immediately after the prospective jurors had sworn to respond truthfully during *voir dire*.

> Have you or any members of your immediate family or close friends even been a victim of, a witness to, or charged with a crime?

Although Mr. J heard the question, he did not respond, even though nineteen other prospective jurors came forward and discussed with the court and counsel for the parties experiences as crime victims, as acquaintances of victims, as relatives of convicted criminals, or as arrestees. None of the parties challenged Mr. J, and he became a juror.[2] The jury selected him as foreman. Neither the three defendants, their counsel, nor government counsel knew of Mr. J's felon status during trial or deliberations. Petitioner was convicted of distribution of cocaine and possession with intent to distribute cocaine. One co-defendant (Mr. Holloman) was convicted of distribution of cocaine but not possession with intent to distribute.[3] The third co-defendant was found not guilty on both counts.

2. The Litigation Below

After the verdict was rendered counsel for the parties learned for the first time that Mr. J was a felon. The two remaining defendants each made a timely motion for a new trial and included the felon-juror issue as one of the grounds. In the alternative, the defendants asked for an evidentiary hearing on the felon-juror issue. The government opposed the motion in all respects. The trial court denied the motion and denied the

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[2] In accordance with the usual practice in the district court, the Juror Qualification Questionnaire was not made available to counsel during *voir dire* or the trial. Knowledge of Mr. J's responses on the Questionnaire and the Jury Office's 1990 inquiry were uncovered in the district court proceedings after the 1992 remand from the court of appeals.

[3] Mr. Holloman participated in the first appeal and the 1994 remand proceedings. He did not participate in the second appeal or later proceedings.

request for an evidentiary hearing. *United States v. Holloman*, 1990 WL 678953 (D.D.C. Nov. 5, 1990), *rev'd and remanded*, *Boney I*, Pet. App. 31a. In part, the court relied upon the fact that the jury had acquitted one defendant of both counts, had convicted another defendant of only one of the two counts, and had convicted petitioner of both counts. *Id.* 1990 WL 678953, at *2.

On appeal, Mr. Boney urged that the presence of a felon on the jury deprived him of his Sixth Amendment right to an impartial jury, which must be interpreted congruently with the congressional decision to statutorily disqualify felons such as Mr. J from jury service. In these circumstances, the party challenging the verdict need not demonstrate actual bias. The felon's concealment of his conviction during *voir dire*[4] demonstrated a continuing refusal to obey the law, thereby calling into question the felon's commitment to decide the case based solely upon the law and evidence at trial. The District of Columbia Circuit remanded for an evidentiary hearing to confirm that the felon-juror had not had his civil rights restored and to determine whether "the juror's failure to disclose his felon status resulted in actual bias to ~~the~~ [defendants]." *Boney I*, Pet. App. 47a. The court explicitly rejected a *per se* rule requiring a new trial because a felon served on the jury despite his deliberate concealment of his felon status. *Boney I*, Pet. App. 45a-46a. Judge Randolph, dissenting, maintained that a new trial should be granted upon confirmation that the felon had not had his civil rights restored.[5] *Boney I*, Pet. App. 55a-65a.

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[4] At the time of the first appeal, the information about Mr. J's perjury in responding to the Juror Qualifications Questionnaire and his lies to the Jury Office were not yet known.

[5] Because no evidentiary hearing had been held before the first appeal, there was uncertainty whether Mr. J's civil rights had been restored.

The procedures adopted by the district court after remand restricted defense counsel's access to the felon-juror or any other source of information. Shortly after the 1992 remand, the district court adopted a suggestion in Judge Randolph's dissent, *Boney I*, Pet. App. 60a, and appointed counsel for the felon-juror. In addition, the district court reinforced the standing rules of that court that forbade counsel from contacting jurors after trial by entering an order prohibiting contact. Counsel for the felon-juror advised the court that Mr. J would invoke his Fifth Amendment right against self-incrimination if called to testify at an evidentiary hearing. The government then sought immunity for the felon-juror, which the district court granted. The court solicited written proposed questions from counsel for the parties and informed counsel that the court alone would pose the questions to the witnesses during the hearing. At the 1994 evidentiary hearing, the Administrator of the Jury Office testified about the Questionnaire and the Jury Office's actions regarding the Mr. J's anomalous response to Question 7. Then the court called the felon-juror and asked some but not all of the questions proposed by counsel. Mr. J confirmed that he had pled no contest to a grand larceny charge[6] in 1985 and had received a one-year sentence with a five-year parole period. He confirmed that his civil rights had not been restored. *Boney II*, Pet. App. 21a (describing testimony). During the hearing, the felon-juror confirmed that he had heard the question during *voir dire* asking whether any prospective juror had been charged with or convicted of a crime. When asked why he did not respond, he indicated that he had conditioned himself to "deny," "lie," or "ignore" questions about his felons status in order "to gain employment . . . [to] get back into mainstream society." *Boney II*, Pet. App. 21a-22a (reprinting verbatim this portion of Mr. J's testimony in the district court).

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[6] During the 1997 evidentiary hearing, the felon-juror referred to his embezzlement conviction.

The district court ruled that certain questions proffered by defense counsel were barred by Fed. R. Evid. 606(b). *Boney II*, Pet. App. 23a-24a & n.3 (reprinting the questions refused by the district court). Defense counsel objected to the refusal; the government supported the court's refusal to ask the questions. After the hearing, the parties briefed the issues. Defense counsel requested that some effort be made to obtain information from the other jurors to test the veracity of Mr. J's testimony. The district court denied the defendants' motion for a new trial and did not grant petitioner's request to obtain information from the other jurors. *United States v. Boney*, 1994 WL 907463 (D.D.C. Aug. 18, 1994), *rev'd and remanded*, *Boney II*, Pet. App. 18a.

In the second appeal, the District of Columbia Circuit found that the district court's procedures for the evidentiary hearing were "insufficient and an abuse of discretion." *Boney II*, Pet. App. 26a. The appellate court held that counsel should be permitted to cross-examine the felon-juror. *Id.*, Pet. App. 28a. The court of appeals held that Fed. R. Evid. 606(b) did not forbid the questions proffered by defense counsel, holding that questions could be asked about the effect on the felon-juror of his exposure to the criminal justice system as well as whether the felon-juror had exposed his fellow jurors to extraneous prejudicial information by discussing those experiences during deliberations. *Boney II*, Pet. App. 27a-29a. The appellate court left the trial court to decide whether to seek information from the other jurors. *Boney II*, Pet. App. 29a.

The second remand hearing occurred more than one-and-a-half years after the 1995 remand. Approximately one year after the remand, the original trial judge recused himself based upon his belief that the *Boney II* decision was inconsistent with later District of Columbia Circuit authority and other authorities. *United States v. Boney*, 942 F. Supp. 47 (D.D.C. 1996). A new judge was randomly selected and a further evidentiary hearing was held in May 1997. In accordance with

Boney II, the district court permitted all counsel to question the felon-juror, whose immunity grant remained in force. *See Boney III*, Pet. App. 14a ("[The juror's] participation included the protection of personal immunity."). The court sustained the government's objections to certain of defense counsel's questions. After the hearing, the parties briefed the issues; the defendant again requested that information be obtained from the other jurors to test the veracity of the felon-juror's testimony.[7]

In February 2000, more than two-and-one-half years after the 1997 evidentiary hearing, the district court denied the motions for a new trial and denied the request to seek information from the other jurors. *Boney III*, Pet. App. 10a-15a. The district court found that the defendant had not presented sufficient evidence to establish actual bias, and that any inconsistencies in the felon-juror's testimony were minor. *Boney III*, Pet. App. 11a-15a. In addition, the district court held that the presence of a felon on the jury did not constitute "exceptional circumstances" to imply bias. *Boney III*, Pet. App. 15a (discussing *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) and *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring), and *id.* at 556 (Blackmun, J., concurring)). And the district court denied the request to seek information from the other jurors to test the veracity of the felon-juror's testimony. *Boney III*, Pet. App. 16a-17a. The court of appeals summarily affirmed finding that the district

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[7] Defendant also requested that the district court allow questioning of the Jury Office in light of the felon-juror's assertion for the first time at the 1997 hearing that he had revealed his conviction to the Jury Office when he was summoned as a juror. This testimony was inconsistent with the testimony obtained from the Jury Office at the 1994 hearing that Mr. J had confirmed that he was not a felon in response to the Jury Office inquiry. The court's final ruling did not grant the request.

court had complied with the *Boney II* requirements. *Boney IV*, Pet. App. 1a-2a.

REASONS FOR ALLOWANCE OF THE WRIT

The decisions of the District of Columbia Circuit below are in conflict with opinions of other Circuits in two different ways. First, one Circuit has held that bias should be implied upon a showing of deliberate lying by a juror in order to conceal information that would subject the juror to a challenge. *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc) (Kozinski, J.). Another Circuit has agreed in *dicta*. *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989) (Winter, J.). This Court's most recent decision concerning post-verdict juror inquiry supports the conclusion that no actual bias need be shown in the case of a felon-juror who lies in order to serve on a jury. Second, several Circuits have held that investigations of juror misconduct require obtaining evidence from jurors other than the juror suspected of misconduct in order to test the veracity of the juror accused of misconduct. *E.g.*, *United States v. Tucker*, 137 F.3d 1016 (8th Cir. 1998); *United States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984); *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980). To the extent the burden is placed on the moving party to demonstrate actual bias, fundamental fairness requires that the district court not unduly hinder or deny the movant access to other jurors.

I. THE COURT OF APPEALS SHOULD HAVE REMANDED FOR A NEW TRIAL UPON A SHOWING THAT THE FELON LIED TO SERVE ON THE JURY.

Recent decisions of this Court have confirmed that a post-verdict inquiry concerning juror misconduct issues is often necessary to uphold the right to an impartial jury. *Williams v. Taylor*, 529 U.S. 420 (2000) (juror intentionally concealed prior familial relationship with chief prosecution witness and prior attorney-client relationship with prosecutor); *Smith v.*

Phillips, 455 U.S. 209 (1982) (juror applied for position with prosecutor's office during trial); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (juror may have concealed involvement in prior litigation that was similar to the pending case).[8] This Court has stated the following test: "[t]o obtain a new trial . . . , a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for challenge for cause." *McDonough Power*, 464 U.S. at 556. The first part of this test excludes situations where a juror's incorrect answer is due to an honest mistake, not deliberate deception. To meet the second part of the test, the litigant must demonstrate a challenge for cause applies. Most challenges for cause involve a demonstration that the proposed juror has a relationship to the party or subject matter of the suit such that the juror cannot be expected to be impartial: family relationships are the most common actual bias situations. With a felon, however, there should be no requirement to demonstrate actual bias for two reasons. First, federal law conclusively disqualifies felons from jury service. Second, the felon that lies to serve on the jury has confirmed a continuing inability to obey the law.

In both *Smith v. Phillips* and *McDonough Power* several justices in concurrence indicated that in "exceptional circumstances" a presumption of bias arises. *Smith v. Phillips*, 455 U.S. at 221-24 (O'Connor, J., concurring) (recognizing that a post-trial hearing may be inadequate to uncover a juror's biases and so implying bias may be appropriate); *McDonough Power*, 464 U.S. at 556-57 (Blackmun, J., concurring) (citing Justice O'Connor's concurrence in *Smith v. Phillips* to support allowing a party to argue implied bias). Lying by a felon to

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[8] Though *McDonough Power* is a civil case, its analysis of juror misconduct has been applied to criminal cases.

serve on the jury presents an appropriate circumstance to imply bias under the exceptional circumstances test.

The courts of appeals have taken fundamentally differing approaches when confronted with a juror who lied under oath during *voir dire* in order to serve on the jury. The Ninth Circuit, en banc, in *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998) (Kozinski, J.), held that "a perjured juror is unfit to serve even in the absence of [a] vindictive bias," and so the juror is presumed to be biased.[9] The juror's lies insert corrosive doubts about the juror's willingness to follow the usual rules imposed on juries: "to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions . . . ." *Id.*

> Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

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[9] Prior to the en banc decision in *Dyer*, the Ninth Circuit applied *Boney I* in a civil case. *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1059-63 (9th Cir. 1997). The court of appeals found that the district court did not clearly err in concluding that the juror "did not fail to answer honestly *material* questions on *voir dire*." *Id.* at 1062. Even assuming the juror lied on collateral matters, such lies were insufficient to have an impact on his jury service. *Id.* Moreover, the court of appeals refused to imply bias. *Id.* at 1062-63 (discussing *Smith v. Phillips*, 455 U.S. at 222 (O'Connor, J., concurring)). To the extent the lies about "collateral matters" included deliberate concealment of felony convictions or implied bias arising from deliberate concealment, it appears unlikely that *Coughlin* survives the en banc decision in *Dyer*. *Cf. Green v. White*, 232 F.3d 671 (9th Cir. 2000) (analyzing lying felon-juror problem by reference to *Dyer* and remanding for issuance of habeas writ for a new trial if the state court does not grant a new trial within reasonable time).

Id. In posing these questions, the Ninth Circuit echoed concerns expressed by the Second Circuit in *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989) ("*Colombo I*")(Winter, J.) (*dicta*).[10]

> Knowingly lying during *voir dire* violated, *inter alia*, 18 U.S.C. § 1621 (1982), and subjected the juror to possible criminal contempt pursuant to 18 U.S.C. § 401 (1982) . . . . It exhibited a personal interest in this particular case that was so powerful as to cause the juror to commit a serious crime. Such an interest not only suggests a view on the merits and/or knowledge of evidentiary facts, but is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court.

Id., at 151-52 (quotation and citations omitted). Judge Randolph's dissent in *Boney I* identified similar problems:

> The difficulty is that the [evidentiary] hearing [on remand] would go but a short distance. What would be the nature of the inquiry? Whether the felon actually was able to render adequate service as a juror? . . . . Perhaps he could be asked whether he honored his oath, followed the judge's instructions and executed faithfully his responsibilities. Suppose he answered in the affirmative. Why should he be

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[10] The discussion in *Colombo I* assumed that the evidentiary hearing on remand would show deliberate lies by the juror concerning family relationships with the prosecutor's office. On remand, the trial court found no deliberate deception, and the court of appeals affirmed. *United States v. Colombo*, 909 F.2d 711, 713 (2d Cir. 1990) ("*Colombo II*"). In *United States v. Langford*, 990 F.2d 65 (2d Cir. 1993), the court distinguished *Colombo I* and found no prejudice from the presence on a jury of a juror who did not deliberately conceal a misdemeanor conviction for grand larceny but did deliberately conceal (because of embarrassment) three misdemeanor arrests resulting in two misdemeanor convictions for prostitution.

> believed? He already lied once about his status, and his position as a felon itself throws doubt upon his veracity. . . . Perhaps the hearing could focus on why he deceived the court by not disclosing his status as a felon. . . . If he did respond, his answers would still suffer from a lack of trustworthiness.

Boney I, Pet. App. 59a-60a (Randolph, J., dissenting). As the quoted passage notes, the lying juror problem becomes even more severe if the juror is a convicted felon who lies to avoid disqualification.[11] Moreover, the felon's lying demonstrated a continued refusal to obey the law that obliges the felon to reveal a conviction when required to do so.[12]

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[11] Some state courts have adopted a rule presuming bias when a juror conceals felon status. *Fleming v. State*, 687 So. 2d 146, 147-49 (Miss. 1997) (invoking the federal Sixth Amendment as well as State constitutional provision). Other states follow common law principles that allow challenges to felon-jurors after verdict. *Wright v. Davis*, 193 S.E. 757, 760-61 (Ga. 1937); *Bennet v. State*, 414 S.E.2d 218 (Ga. 1992) (recognizing continued validity of *Wright* but concluding juror did not intentionally answer untruthfully).

[12] By contrast when a juror tells the truth and reveals a disqualifying felony, and the parties do not further investigate or object, no post-verdict challenge is allowed. *United States v. Humphreys*, 982 F.2d 254, 260-61 (8th Cir. 1992) (citing *Boney I*) (juror revealed 30 year old felony conviction during *voir dire* and defendant waited until after trial to investigate and discover that juror's civil rights had not been restored); *United States v. Uribe*, 890 F.2d 554, 561-62 (1st Cir. 1989) (juror revealed felony conviction on Juror Qualification form and defense counsel failed to invoke right to review form during *voir dire*); *United States v. Mussehl*, 453 F. Supp. 1235 (D.N.D. 1978) (defendants failed to move for new trial after learning of juror's prior conviction while jury deliberating). Applying waiver principles in such cases is unexceptional because a defendant can waive a right to challenge a biased juror. These cases do not, however, provide any support for rejecting a defendant's challenge when a juror has deceived the parties and the trial court during *voir dire* by concealing a disqualification.

The *Boney I* majority followed earlier Circuit precedent, *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), that rejected *Colombo I*[13] and remanded for an evidentiary hearing "to determine whether the juror's failure to disclose his felon status resulted in actual bias to [defendants]." *Boney I*, Pet. App. 46a, 47a. An alternative holding in the First Circuit agrees that the movant must "shoulder the burden of establishing harm" from the presence of the felon-juror. *United States v. Uribe*, 890 F.2d 554, 562 (1st Cir. 1989). Cases in the courts of appeals predating *Smith v. Phillips* and *McDonough Power* also refused to grant a new trial when a juror hid a disqualifying conviction of felony charge unless the challenging party could demonstrate bias. *United States v. Currie*, 609 F.2d 1193 (6th Cir. 1979); *Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953).

The persistence of the continuing differences among the courts of appeals about the problem of a lying juror should be resolved by this Court. Indeed, this Court has recognized that there is uncertainty in this area. In a recent case, the Court explicitly noted that the "standard for determining the prejudice that petitioner must establish to obtain relief on [claims concerning a lying juror] can be addressed by the Court of Appeals or the District Court in the course of further proceedings." *Williams v. Taylor*, 529 U.S. at 444. Petitioner's case is an appropriate time for this Court to resolve the question concerning a juror who deliberately lies and that lie conceals felon status.

As Judge Randolph explained, this Court's decisions in *Raub v. Carpenter*, 187 U.S. 159 (1902), and *Kohl v. Lehlback*, 160 U.S. 293 (1895), are not controlling. *Boney I*,

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[13] "We decline to follow *Colombo [I]* insofar as it stands for the proposition that juror dishonesty at *voir dire* is *per se* evidence of the juror's partiality and therefore compels as mistrial." *North*, 910 F.2d at 905.

Pet. App. 58a-59a (Randolph, J., dissenting). In *Raub*, a civil case, the juror concealed that he was underage and had prior convictions. This Court first determined that the verdict "was the only one that 'could be rendered consistently with the facts,' [therefore] the presence of the felon-juror could not have prejudiced the appellants." *Boney I*, Pet. App. 58a (Randolph, J., dissenting). "*Raub* rested on the fact that, since a directed verdict could have been entered, the plaintiff could not possibly have been prejudiced by the juror's presence." *Boney I*, Pet. App. 59a (Randolph, J., dissenting).[14] Unnoted by Judge Randolph, *Raub* also indicated that a disqualification *propter delictum* (for conviction of infamous crime) was not in itself fatal after verdict.[15] 187 U.S. at 164. *Raub* was decided

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[14] Nonetheless, the *Raub* Court then examined whether the presence of a disqualified juror rendered the judgment "a nullity for want of power to enter it." *Boney I*, Pet. App. 58a. The *Raub* Court cited *Kohl*, holding that the presence of an alien subject to challenge *propter defectum* did not make the judgment "absolutely void," to conclude the presence of the felon in *Raub* did not make that judgment absolutely void either. *See Boney I*, Pet. App. 58a-59a (discussing the interaction between *Kohl* and *Raub*).

[15] In *Raub*, this Court equated a disqualification *propter delictum* (for infamous crime) with a disqualification *propter defectum* (for alienage, lack of freehold estate, underage, and similar grounds). *See* 3 William Blackstone, *Commentaries on the Laws of England* 361-64 (1768) (describing the four common law grounds for disqualification: *propter honoris respectum* (on account of noble status), *propter defectum* (alienage, lack of freehold estate, age, other grounds), *propter affectum* (kinship with a party, interest in a case, action pending against a party, membership in same society, employment relationship with party, and related issues) and *propter delictum*). In general, challenges *propter affectum* could be raised after verdict and challenges *propter defectum* could not. Courts reached differing conclusions as to whether a challenge *propter delictum* was treated like *propter affectum* or *propter defectum*. *Wright v. Davis*, 193 S.E. at 760-61 (*propter delictum* could be raised after verdict); *State v. Levy*, 122 S.E. 386, 389 (N.C. 1924) (*propter delictum* treated as lack of good moral character and classified as *propter*

in the era when the qualifications and exemptions for federal jury service were governed by state law, often state common law. *See Pointer v. United States*, 151 U.S. 396, 407-08 (1894) (explaining system). In 1948, Congress adopted the first federal statute (then codified at 28 U.S.C. § 1861), later revised by the Jury Selection and Service Act of 1968 (and minor amendments in subsequent acts) to become the current 28 U.S.C. § 1865. This legislatively adopted system did not mirror the old common law classification scheme, making reliance on cases utilizing the common law categorization problematic.[16] For all these reasons, neither *Raub* nor *Kohl* should be considered controlling authority.

Unlike most situations involving a lying juror, the lying felon-juror presents a clear cut case for a new trial. A felon-juror who deliberately conceals felon status clearly meets the first prong of the *McDonough Power* test. In addition, there can be little doubt that a challenge for cause prior to verdict can be based on felon status alone, without any showing of actual bias. After the jury is empaneled and before it begins to deliberate, courts frequently remove a juror on the grounds of felon status apparently without requiring the movant to show actual bias. *E.g.*, *United States v. Webster*, 162 F.3d 308, 347-48 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999). Even while the jury is deliberating, a felon-juror can be removed apparently without a showing of actual bias by

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affectum); *Beasley v. State*, 96 So. 2d 693, 698-700 (Ala. App. 1957) (*propter delictum* can be raised after verdict and criticizing Oregon and Tennessee authorities cited in *Raub* that held to the contrary); *State v. Brockhaus*, 43 A. 850 (Conn. 1899) (equating *propter delictum* and *propter affectum* and distinguishing from *propter defectum*) (*dicta*).

[16] Moreover, at common law, challenges *propter defectum* often could not be brought after the jury was sworn and trial had commenced. Thus, if *Raub* were still in full force equating *propter defectum* and *propter delictum*, it seemingly would prohibit removal of a felon-juror anytime after the jurors had been selected and sworn.

the party bringing the challenge. *United States v. McFerren*, 907 F. Supp. 266 (W.D. Tenn. 1995) (allowing deliberation by jury of eleven under Fed. R. Crim. P. 23(b) after removing the felon-juror; motion for mistrial denied), *aff'd*, 142 F.3d 437 (6th Cir. 1998).

Removing a felon-juror without requiring a showing of bias is consistent with the policy judgment made in the federal statute disqualifying a felon from jury service, 28 U.S.C. § 1865(b)(5), which encapsulates congressional concern that a felon will be unable to adjudicate fairly.[17] The House Report indicates that § 1865(b)(5) contains "some guarantee of 'probity' at least to the extent that persons are disqualified who have charges pending against them for, or have been convicted of, a crime punishable by imprisonment for more than 1 year."

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[17] Typically, the exclusion of unqualified candidates under § 1865(b)(5) would occur based upon the candidates' responses to the Juror Qualification Questionnaire. 28 U.S.C. § 1865(a) ("The chief judge of the district court [or a designated judge] on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for . . . jury service."). If the court is not following the statutory procedures and the local selection plan, a party may challenge the non-compliance. 28 U.S.C. § 1867(a), (b), (e). But despite the § 1867(e) provision limiting the timing of such a challenge, the statute preserves the right to challenge jurors for cause or peremptorily. 28 U.S.C. § 1866(c)(3) & (4). The House Report relating to the adoption of the Jury Selection and Service Act of 1968 further confirms the congressional intent to maintain the right to challenge for cause. H. Rep. No. 90-1076, *reprinted in* 1968 U.S.C.C.A.N. 1792, 1802-03. The Report specifically noted that the "bill preserves the traditional right of the parties to challenge a juror for cause or to strike him peremptorily." *Id.* at 1797. "[S]ubsections [1866](c)(3) and (4) specifically preserve two traditional bases for elimination—elimination on peremptory challenge and the challenge for cause. Candidates are to be eliminated pursuant to the procedures presently specified in section 1870 of title 28, and in Federal Rule of Civil Procedure 47 and Federal Rule of Criminal Procedure 24." *Id.* at 1804.

H. Rep. No. 90-1076, *reprinted in* 1968 U.S.C.C.A.N. 1792, 1796. The Report also notes that a jury "is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." *Id.* Courts have recognized the linkage of probity with impartiality concerns in other contexts. "Juror probity [is] the essence of the system. It refers to a juror's reliability at the outset to fill an important societal role. . . . It is rational to believe that [a person charged with a crime] may not take seriously his obligation to follow the law as a juror is sworn to do." *United States v. Barry*, 71 F.3d 1269, 1273 (7th Cir. 1995) (citation omitted). One court of appeals has explicitly noted the linkage between probity concept and the impartiality concept. "This is, of course, the probity/unbiased-juror argument slightly restated and from a slightly different perspective. . . . [W]e accept the proposition that the exclusion [of accused felons] is rationally related to the legitimate governmental purpose of assuring the unquestionable integrity of jurors and selecting jurors who are likely to be unbiased . . . ." *United States v. Greene*, 995 F.2d 793, 798 (8th Cir. 1993).

The majority in *Boney I* offered two reasons for requiring a showing of actual bias; neither withstands examination. First, the majority contends that felon status does not automatically indicate a bias in favor of or against one side or the other. *Boney I*, Pet. App. 45a. Yet this position ignores the real possibility that a felon, unlike most citizens, is more susceptible to a variety of biases. These biases may include: sympathy for an accused, a desire to curry favor with the government, a desire to demonstrate that the felon has reformed, *Boney II*, Pet. App. 27a, a distrust of the government or desire to get back at the government, a jaundiced view of the veracity of criminal defendants based upon the felon's exposure to other criminals, *Barry*, 71 F.3d at 1273, or a belief that one was unjustly convicted coupled with a desire to retaliate. Such likely biases do not all favor one party. *Cf. Barry*, 71 F.3d at 1273 ("no need to theorize about whether an accused felon is

likely to be biased against the government"). Yet juror impartiality must mean more than merely that likely biases are in equipoise. Instead, to be impartial a juror must be *free* of bias.[18] In addition, a conviction and punishment for a felony is certain to have some effect on a person. *See Barry*, 71 F.3d at 1273 ("simply being charged with a crime says something about a person, something which is material to his ability to serve as a juror"). Even assuming that the felon would reveal all relevant prejudices resulting from the conviction during the *voir dire*, weighing the competing biases is too difficult. A rule banning felon participation in juries upon objection by either party better protects jury impartiality by avoiding the difficult subjective divination of the likely effect on the specific proposed felon-juror's role as judge of the facts in a particular case.

The second reason the court of appeals rejected a *per se* rule was its view that *McDonough Power* reflected this Court's "hostility to unnecessary new trials." *Boney I*, Pet. App. 45a & n.8. This Court's recent decision in *Williams v. Taylor*, 529 U.S. 420 (2000), demonstrates that this Court has no generalized hostility to new trials sufficient to override concern that a lying juror corrupted the impartiality of the jury. *Williams v. Taylor* involved a habeas review in federal court after the full state court appellate review and initial state habeas review had denied relief. By remanding for an evidentiary hearing that examined whether the presence of the lying juror cast doubt on juror impartiality, the Court forcefully demonstrated that any supposed distaste for new trials will not prevent a post-verdict juror inquiry and a grant of a new trial in appropriate circumstances.

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[18] A similar rationale prevents a counsel who has two clients from adjudicating disputed matters between them without their consent. Even though the counsel's conflicting biases may cancel out, his multiple likely biases disables him from acting as an impartial judge between them.

Several policy grounds also support resolving this lying felon-juror issue at this time. The *Boney I* result creates a serious risk of an unfair dichotomy between the treatment of criminal cases and civil cases in which a felon lied to become a juror. Judge Randolph's dissent recognized that the felon-juror probably would need counsel and would seek immunity before participating in any evidentiary hearing. *Boney I*, Pet. App. 60a (citing 18 U.S.C. §§ 401, 1621). A juror who lied on the Qualification Questionnaire and during *voir dire* and did not seek immunity would be exposed to prosecution for perjury. During the first remand in *Boney*, the district court appointed counsel for the felon-juror; the felon-juror invoked his Fifth Amendment right to refuse to testify without a grant of immunity. The government sought a grant of immunity, which the court ordered. Mr. J then testified. The same immunity grant remained in effect for the second evidentiary hearing. In a civil proceeding, a felon-juror would be exposed to the same potential criminal liability and likely would invoke the Fifth Amendment privilege. The crucial difference is that the government would have no incentive to grant immunity, with the possible exception of cases where the government is the prevailing civil litigant. Without a grant of immunity to the felon-juror, there would be no evidentiary hearing of any substance, and the grant of a new trial would be a foregone conclusion under the *Boney I* majority opinion. Thus, the *Boney I* decision will create differing outcomes for parties in civil and criminal cases. The likely divergence between civil and criminal cases argues for a rejection of the *Boney I* outcome and adoption of the result advocated in Judge Randolph's dissent—grant of a new trial upon demonstration that the felon lied to become a juror.

The need to immunize the felon-juror in order to proceed with an evidentiary hearing presents a second policy reason for rejecting the *Boney I* outcome. The risk is too great that the immunized felon-juror will seek to placate the government by the juror's testimony at the post-verdict evidentiary hearing.

All the felon-juror need do is deny that his or her experiences with the criminal justice system as a felon did not influence the deliberations and that the experiences were not discussed with other jurors during deliberations. Absent testimony from other jurors,[19] there will be no check on the veracity of the felon-juror's immunized assurances. Moreover, even if the other jurors are examined, they could provide information only if the felon-juror discussed the experiences with them. Finally, there is an inherent difference in immunizing a fact witness (who will be examined and cross-examined at trial with all parties having an opportunity to present contradictory witnesses and evidence) and immunizing a juror who adjudicated the case while denying the parties any opportunity to develop contradictory evidence or testimony. *See infra* II.

The result from *Boney I* also will have a deleterious effect on judicial administration. Adopting the *Boney I* majority view creates a perverse incentive by encouraging felons called for jury service to lie. If a felon reveals a conviction on the Questionnaire, the felon is not even called for service. *See Boney I*, Pet. App. 61a (Randolph, J., dissenting) (citing Modified Plan for the United States District Court for the Random Selection of Grand and Petit Jurors (As Amended Through August 15, 1991, §§ E & F, at 4)). If the felon appears for service and responds correctly at *voir dire*, the

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[19] Judge Randolph, dissenting in *Boney I*, theorized that no testimony could be obtained from the other jurors because of the strictures of Fed. R. Evid. 606(b). *Boney I*, Pet. App. 59a. As the *Boney II* panel correctly recognized, however, Rule 606(b) does not bar questioning of other jurors about whether the felon-juror made statements to the other jurors revealing a bias concealed during *voir dire* or statements that introduced into the deliberations extraneous information based on his experiences in the criminal justice system as one accused and convicted of a crime or serving a sentence and parole. *Boney II*, Pet. App. 27a-29a.

felon is almost invariably dismissed.[20] Indeed, the government has been quite zealous in contending that felons cannot serve on juries, and the courts have upheld the § 1865(b)(5) exclusion against constitutional challenges. *Barry*, 71 F.3d at 1273-74 (upholding exclusion of persons charged with crimes);[21] *Greene*, 995 F.2d at 795-96 (same).[22] If the felon lies during *voir dire* but is unmasked during trial, the felon is dismissed from the panel upon request of a party. *Webster*, 162 F.3d at 347-48. Such dismissals can occur even during deliberations at the request of either party and over objection of the other party. *McFerren*, 907 F. Supp. 266 (W.D. Tenn. 1995) (removing felon-juror during deliberations on government motion over objection of defendant and affirming conviction by jury of eleven). In these latter two situations, the government can choose to prosecute the felon for lying during *voir dire*. Yet when the felon's lies succeed and are not uncovered until after the verdict, as in *Boney*, the felon faces

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[20] The situation discussed in *Uribe* must be considered rare. *Uribe*, 890 F.2d at 561-62 (felon disclosed his conviction on the Juror Qualification Questionnaire, which the judge saw, but the counsel were not made aware of it by the judge though counsel could have asked to see the Questionnaires). For example, at the time of the criminal trial in the United States District Court for the District of Columbia, counsel were not routinely provided with the Juror Qualification Questionnaires.

[21] As the court of appeals in *Barry* recognized: once a court has made a determination of probable cause that the person charged with a crime has "disregarded the law[, it] is rational and not entirely theoretical to think he could do so again—in favor or one side or the other—if he were a juror." 977 F.2d at 1273.

[22] The court of appeals in *Greene* noted that excluding accused felons is compatible "'with [the] significant [governmental] interest,' *Duren [v. Missouri]*, 439 U.S. [357,] 368 [(1979)], of having jurors who 'can conscientiously and properly carry out their sworn duty to apply the law to the particular facts of the case,' *Lockhart [v. McCree]*, 476 U.S. [162,] 184 [(1986)]." *Greene*, 995 F.2d at 797 (text brackets original, citation brackets added).

no real consequence, at least in criminal cases, for the government must immunize the felon to procure testimony for the post-verdict evidentiary hearing required under *Boney I* in order to preserve the conviction of the defendant. "[C]ourts cannot administer justice in circumstances in which a juror can commit a federal crime in order to serve as a juror in a criminal case and do so with no fear of sanction so long as a conviction results." *Colombo I*, 869 F.2d at 152. Conversely if a new trial is granted because of the felon's participation in the verdict without any need for an evidentiary hearing (except to confirm that the juror was convicted of a felony punishable by more than a year imprisonment and deliberately concealed the conviction), the felon has not succeeded in perverting the judicial system and the felon will face the prospect of prosecution for perjury. The threat that the felon will be punished even when the lies are not uncovered until after verdict will act as a strong disincentive to conceal felon status on the Questionnaire and during *voir dire*.

For all these reasons, this Court should resolve the conflict between the court of appeals concerning the proper outcome when a person lies to serve on a jury. In this context, lies about felon status should result in a new trial in view of the strong congressional policy against service by felons on juries.

II. THE RULINGS BELOW IMPROPERLY RESTRICTED THE PETITIONER'S RIGHT TO OBTAIN EVIDENCE FOR THE POST-VERDICT HEARING.

Further error occurred by the rulings that prohibited petitioner from seeking relevant information from other jurors; such rulings were in conflict with rulings of other courts of appeals allowing access to other jurors in similar circumstances. Under the district court's standing rules, counsel cannot contact jurors after verdict without court permission. D.C. Local Criminal Rule 24.2(b) (1999) (previously D.D.C. Rule 115(b) (1990)). The district court in

this case reinforced this local rule by an order that prohibited counsel from contacting the felon-juror as well as from taking any other steps without court approval.[23] In 1994, the court did not grant petitioner's request to seek information from the other jurors. Later, in remanding for further proceedings, the *Boney II* court refused to require the district court to obtain information from the other jurors. *Boney II*, Pet. App. 29a. After the 1997 evidentiary hearing, the district court in denying the motion for a new trial also denied petitioner's request that an effort be made to obtain relevant evidence from the other members of the jury.[24] *Boney III*, Pet. App. 16a-17a. Consequently, petitioner had no opportunity to obtain information about the felon-juror from other jurors in order to test the veracity of the felon-juror's claims that he was unbiased.

By denying the petitioner the right to seek information from the other jurors, the district court, as affirmed by the appellate court, fundamentally undermined the right to a fair and adequate post-verdict evidentiary hearing. Other jurors often can provide relevant evidence to demonstrate that the juror under suspicion has not told the truth in the post-verdict evidentiary hearing. *E.g.*, *Williams v. Taylor*, 529 U.S. at 443 (referring to information obtained by interviewing jurors other than the juror accused of misconduct); *Green v. White*, 232 F.3d at 673-74 (describing testimony from other jurors contradicting testimony of the felon-juror). Moreover, when

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[23] As the district court's Jury Office would be the source of information to locate the other jurors, it was practically impossible for petitioner's counsel to obtain information from the other jurors without the district court's permission.

[24] In addition the district court did not grant petitioner's request that the Jury Office be examined about some inconsistencies between the testimony of the felon-juror in 1997 and the Jury Administrator's testimony in 1994 concerning the Jury Office's inquiry.

a juror has committed misconduct, at least three courts of appeals require that other jurors be examined as part of the post-verdict hearing. *United States v. Tucker*, 137 F.3d at 1032 ("a defendant who makes an allegation of serious misconduct by a juror . . . is entitled to a more thorough investigation . . . than merely asking the juror whether he committed the misconduct."); *United States v. Brantley*, 733 F.2d at 1440 ("binding precedent . . . holds that a juror's denials of misconduct are an insufficient basis upon which to reject a claim of misconduct"); *United States v. Forrest*, 620 F.2d at 457 (testimony of juror alleged to have committed misconduct insufficient; examination of some of the other jurors required). The decision in *Boney II* to let the district court decide in the first instance whether to seek information from the other jurors to the discretion of the trial judge was not facially erroneous because if Mr. J had revealed actual bias there would be no need seek evidence from the other jurors. But the district court rejection of petitioner's request, *Boney III*, Pet. App. 16a-17a, and the summary affirmance by the court of appeal, *Boney IV*, Pet. App. 1a-2a, undermined petitioner's right to a fair opportunity to demonstrate actual bias in the evidentiary hearing. This result is particularly troublesome where, as here, the district court placed the burden to demonstrate actual bias on petitioner. *See Boney III*, Pet. App. 13a ("defendant failed to demonstrate that any particular element of the Juror's criminal experience . . . biased the Juror against the defendant."). Because denial of an opportunity to obtain additional relevant information for the evidentiary hearing conflicts with clear precedent in several Circuits requiring that post-verdict proceedings provide a fair and adequate opportunity to examine jurors other than the one whose misconduct is at issue, this Court should grant the petition to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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March 2, 2001

APPENDIX

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-3032 September Term, 2000

UNITED STATES OF AMERICA, Criminal Action No. 89-0381

Appellee

v.

JERMAINE BONEY,

Appellant

On Appeal from the United States District Court
for the District of Columbia

Before: HENDERSON, ROGERS AND TATEL, *Circuit Judges.*

JUDGEMENT

This case was heard on the record from the United States District court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). The court concludes, specifically, that on remand the district court scrupulously followed this court's decision in *Boney II*. *See United States v. Boney*, 68 F.3d 497 (D.C. Cir. 1995). Accordingly, it is

ORDERED that the judgment from which this appeal has been taken be affirmed substantially for the reasons stated in the district court's memorandum opinion of February 18, 2000. *See United States v. Boney*, 97 F. Supp.2d 1 (D.D.C. 2000).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

s/ Mark J. Langer, Clerk

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

UNITED STATES of America
v.
Jermaine BONEY, Defendant.

No. 89-381 EGS.

Feb. 18, 2000.

MEMORANDUM OPINION

SULLIVAN, District Judge.

INTRODUCTION

This matter is before the Court on remand from the D.C. Circuit pursuant to its decisions in *United States v. Boney,* 977 F.2d 624 (D.C. Cir. 1992), ("*Boney I*"), and *United States v. Boney,* 68 F.3d 497 (D.C. Cir. 1995), ("*Boney II*"). In *Boney II* the Circuit Court directed the District Court to conduct a second post-trial evidentiary hearing to determine whether defendant was prejudiced by the jury foreman's failure to disclose his felon status during defendant's trial. The original judge who had presided over the trial and remand after *Boney I,* recused himself after the second remand and the case was randomly reassigned to Judge Emmet G. Sullivan by the U.S. District Court's Calendar Committee pursuant to Local Rule 403(a).

In 1991 defendant Jermaine Boney was convicted of distribution of cocaine and possession with intent to distribute more than five grams of cocaine. After the jury returned the verdict but prior to sentencing, the prosecutor confirmed a tip from counsel for co-defendant Donald Holloman that the foreman of the jury ("the Juror") had failed to disclose a grand

larceny conviction in San Francisco, California, on the jury questionnaire form and during voir dire.

On appeal, defendant maintained that the presence of a felon on the jury violated his Sixth Amendment right to an impartial jury. The Circuit Court affirmed defendant's conviction on all grounds with the exception of the juror- bias claim and "remand[ed the] case for the District Court to hold an evidentiary hearing to determine whether the [J]uror's failure to disclose his felon status resulted in actual bias to [defendant]." *Boney I*, 977 F.2d at 635. On remand, the District Court conducted a post-trial evidentiary hearing and ruled that the Juror's failure to disclose his felon status did not result in actual bias to defendant. Thus, the District Court denied defendant's motion for a new trial. *See Boney II*, 68 F.3d at 501. In *Boney II* the Circuit Court held that the District Court's evidentiary hearing was insufficient to determine the potential biases of the Juror and remanded the case for the District Court to hold a second post-trial evidentiary hearing. *Id.* at 503. At the second hearing the government argued that defendant was not unfairly prejudiced by the Juror's presence and that the Juror's prior criminal history did not impact the jury's deliberations. Defendant reasserted his claim of juror bias.

Upon consideration of the testimony, evidence, and arguments of counsel presented during defendant's second evidentiary hearing, this Court concludes that defendant has not clearly demonstrated that the Juror's lack of qualifications presented bias or prejudice, actual or inferred, "affecting the [J]uror's impartiality and impacting the fairness of the trial." *United States v. Humphreys*, 982 F.2d 254, 261 (8th Cir. 1992). Accordingly, defendant was not deprived of his Sixth Amendment right to an impartial jury, and defendant's motion for a new trial is **DENIED.**

I. *BACKGROUND*

In 1991 defendant Jermaine Boney and co-defendant Donald Holloman were convicted of drug trafficking pursuant to 21 U.S.C. § 841(1). After being tipped that the jury foreman was a felon, Boney and Holloman appealed their convictions on grounds of jury bias. On appeal, the Circuit Court affirmed defendants' convictions but remanded the case to the district court to hold an "evidentiary hearing to determine whether [the J]uror's failure to disclose his felon status resulted in actual bias against the [defendants]." *Boney I*, 977 F.2d at 637.

On remand, counsel for both parties submitted proposed questions to the Court that were intended to expose evidence of actual bias to defendant. The District Court then held a hearing but posed only those questions to the Juror that the Court found to be relevant and admissible under Fed. R. Evid. 606.[1]

The District Court concluded that the Juror's failure to "disclose his felon status did not result in actual bias to the defendants." *Boney II*, 68 F.3d at 501 (citation omitted). The District Court then denied Boney's motion for a new trial and his motion for reconsideration of the decision not to ask several

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[1] Fed. R. Evid. 606 provides, in pertinent part, that: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.*" Fed. R. Evid. 606(b) (emphasis added).

of his proposed questions. Boney appealed those rulings to the Circuit Court.[2]

On appeal, the Circuit Court held that: (1) at the hearing to determine whether defendant was biased by the Juror's denial of his felon status, the District Court's questions to the Juror were insufficient to reveal any prejudice that might have affected jury deliberations; (2) defense counsel was entitled to cross-examine the Juror at the evidentiary hearing; and (3) the trial court could inquire as to whether the Juror's felon status was mentioned during jury deliberations and what circumstances might have surrounded such a disclosure, without violating Fed. R. Evid. 606(b). *See id.* at 502-03.

Following the second remand, the original trial judge recused himself from further proceedings, and now this matter and the underlying issues come before this Court on defendant's renewed motion for a new trial. After receiving briefs and proposed questions from counsel for the parties, the Court conducted a second evidentiary hearing.

Testimony at the evidentiary hearing revealed that the Juror had pleaded *nolo contendere* to a charge of grand larceny in San Francisco in 1985 and served nine months of a one-year sentence, which was followed by a term of probation. The Juror was still on probation when he completed the Juror Qualification Questionnaire but omitted this conviction. The Juror vaguely recalled mentioning his felon status to an individual in the Jury Office on the day of trial but remembered only being asked to return to the jury room. The Juror failed to disclose his felony conviction during voir dire and was later impaneled as a member of defendants' jury.

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[2] Holloman was a co-appellant on the first appeal to the Circuit Court, *see Boney I*, 977 F.2d 624, but was not a party to the second appeal, *see Boney II*, 68 F.3d at 499 n.2, or to the present proceeding before this Court.

II. *DISCUSSION*

The Court begins its analysis by discussing both the manner in which it conducted the second post-trial evidentiary hearing and the sufficiency of its inquiry. The Court will then examine the Juror's testimony and consider its relevance to the establishment of actual bias. Next, the Court will consider what evidence exists, if any, from which bias against defendant might be inferred. Of particular concern are questions raised by defendant regarding the Juror's credibility and his prior history of untruthfulness on the subject of his felony conviction. The Court will then address defendant's renewed request to poll the jury panel in defendant's criminal trial before finally determining if defendant's Sixth Amendment rights were prejudiced sufficiently to warrant a new trial.

A. *RIGHT TO A NEW TRIAL*

Defendant contends that the Sixth Amendment guarantee of an impartial jury requires a new trial. Although the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," it is well established that the "Sixth Amendment right to an impartial jury does not require an *absolute bar* on felon-jurors." *Boney I*, 977 F.2d at 633. The result is that "[t]he Sixth Amendment guarantee of an impartial trial does not mandate a *per se* invalidation of every conviction reached by a jury that included a felon." *Id.* (citing *United States v. Uribe*, 890 F.2d 554, 562 (1st Cir. 1989)). In fact, "[a] *per se* rule would be appropriate ... only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias." *Id.*

The Court in *Boney I* also noted that "a *per se* rule requiring a new trial whenever a felon serves on a jury is inconsistent with [the] hostility to unnecessary new trials" expressed in

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 553-54 (1984). *See* 977 F.2d at 633. Moreover, such a rule runs contrary to the axiom that "'a defendant is entitled to a fair trial but not a perfect one.'" *Id.* (quoting *Lutwak v. United States,* 344 U.S. 604, 619 (1953)). Therefore, this Court cannot determine a Sixth Amendment violation or grant defendant's motion for a new trial based simply upon the Juror's felon status. Rather, the Court must determine if the presence and participation of a felon, both on the jury panel and as jury foreman, were sufficient to prejudice the jury's determination of guilt.

B. *POST-TRIAL HEARING*

The Supreme Court has not directly addressed the question of "whether a hearing is *required* when it is revealed after trial that a juror had concealed relevant information," *Boney I,* 977 F.2d at 634, such as felon status, but the Court has noted that allegations of juror partiality are best remedied by a "hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips,* 455 U.S. 209, 215 (1982). In remanding the case to this Court, the *Boney II* Court described in detail the type of inquiry necessary to expose potential juror bias: "[A]lthough juror-bias hearings need not be conducted as full evidentiary proceedings, the inquiries put to the juror must be 'sufficiently detailed to permit the judge to determine whether any prejudice is likely to [have resulted].'" 68 F.3d at 501 (citing *United States v. Butler,* 822 F.2d 1191, 1196 (D.C. Cir. 1987)).

The *Boney II* Court also took notice of a number of specific questions that the District Court excluded from defendants' first post-trial evidentiary hearing,[3] finding them necessary "to

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[3] These questions included:

18 "Did you disclose your criminal conviction(s) to any of your fellow jurors? If so, when?"

discover any possible prejudice." *Id.* at 502. During the second evidentiary hearing, this Court asked the questions that were previously excluded.[4]

The Circuit Court also concluded that the District Court not only failed "to ask more probing questions" but also "erred in not permitting Boney's counsel to cross-examine the juror." *Id.* at 503. In contrast, defendant's second evidentiary hearing included direct examination, cross-examination, and re-direct examination—all conducted by counsel—as well as additional questioning by the Court. The Court granted defense counsel considerable latitude in her inquiries, which covered: (1) the Juror's experience in the criminal justice system, including arrest, trial, and incarceration; (2) his efforts to re-assimilate once released on probation; (3) his attempts to seek employment; (4) his personal beliefs about drugs; (5) his explanations for failing to disclose his felony conviction on the jury questionnaire and during voir dire; and, most importantly, (6) his conduct during jury deliberations. This cross-examination was extensive and included approximately eighty-five questions, which clearly exceeded the scope of defendant's first evidentiary hearing. *See id.* at 498.

As a result of these efforts, the Court has a complete and fully developed record upon which to determine actual bias by the Juror.

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19 "During your discussions with your fellow jurors, did you disclose any information ... that you acquired as a result of your criminal prosecution and sentence?"
22 "Did your experiences as a convicted felon or as a criminal defendant or as an arrestee affect your votes in the jury deliberations in this case? If so, how?"
Boney II, 68 F.3d at 500-01.

[4] Some of the questions were designed to elicit information about any discussion of the Juror's "experience with the criminal justice system" as well as "possible biases relating to [the Juror's] felon status." *Boney II,* 68 F.3d at 500-01.

C. *JUROR BIAS*

As a general principle, post-trial juror-bias hearings are intended to provide the defendant, or moving party, with the "opportunity to prove actual bias." *Boney II*, 68 F.3d at 501; *Boney I*, 977 F.2d at 634 (both citing *Smith v. Phillips*, 455 U.S. 209, 215 (1982)); *see also United States v. North*, 910 F.2d 843, 904 (D.C. Cir. 1990)(citing *McDonough*, 464 U.S. at 556)("Read along with the concurrences of five Justices, *McDonough* suggests that *an aggrieved party* must show that the juror's correct response at voir dire would have demonstrated actual bias.") (emphasis added), *cert. denied*, 500 U.S. 941 (1991). In *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996), the D.C. Circuit applied the standard for establishing juror impartiality to the context of the voir dire process. The Court noted that:

> For reversal because of a juror's failure to disclose information at voir dire, the Supreme Court requires the complaining party to show that the juror "failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."

90 F.3d at 503 (citing *McDonough*, 464 U.S. at 556 (plurality)).[5]

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[5] "[T]o be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on voir dire, and that, under the facts and circumstances surrounding a particular case, the juror was biased against the moving litigant." *McDonough*, 464 U.S. 548, 557-58 (Brennan, J., with Marshall, J., concurring).

1. ***Actual Bias***

The Circuit Court found the Juror's conduct and his refusal to admit his previous crime "particularly troublesome" and recognized that "[l]ying about a factor as important (and as easy to verify through public records) as felon status raises at least the inference that the [J]juror had an undue desire to participate in a specific case, perhaps because of partiality." *Boney I*, 977 F.2d at 634. Yet, as recently as 1996, the Circuit Court considered the issue of juror credibility in a very similar context and concluded that a district court's failure to credit a juror's testimony on certain issues related to voir dire did not constitute partiality or prejudice when any other showing of actual bias in jury deliberations was lacking. *See United States v. Williams-Davis*, 90 F.3d at 503.

In *Williams-Davis*, the Court noted its previous application of the *McDonough* standard in *United States v. North*, 910 F.2d at 903-04, observing that:

> [W]e upheld the trial court's finding that there was no actual bias, even though the trial court disbelieved the juror's post-trial "forgetfulness" explanation of her failure to reveal that several of her brothers had been charged with criminal conduct.

90 F.3d at 503. Even if this Court did not credit the Juror's explanation as to why he omitted a California conviction from his District of Columbia jury questionnaire or his vague recollection of a conversation with the Jury Office regarding his probationary status, additional evidence would still be necessary to establish actual bias and to demonstrate prejudice to defendant's case.

Defendant claims that the Juror's grand larceny conviction (a crime of dishonesty), when combined with testimony that he lied about his conviction to take part in the jury selection process, to secure employment, and to "get ahead," constitutes sufficient evidence to determine actual bias. *See* 5/20/97 Tr. at

51. Yet final discretion as to the Juror's credibility and the existence of prejudice against defendant as a result of the Juror's presence and participation, rests clearly with the court conducting the relevant inquiry. As articulated by the Circuit Court in *Williams-Davis:*

> We think that where the court conducts an inquiry broad enough to lead it to a reasonable judgment that there has been no prejudice, on an assumption as to the facts favorable to defendants' claim, it has fulfilled its procedural as well as its substantive duty.

90 F.3d at 499.

The Court is troubled by the Juror's omissions, which were articulated in prior hearings and re-emphasized during defense counsel's cross-examination, including the Juror's failure to complete his jury questionnaire honestly and accurately and his failure to notify the trial court of his felony conviction during voir dire.

Defendant argues that the Juror is not trustworthy and that his testimony reflects a pattern of self-serving dishonesty. Defendant also characterizes the explanations given by the Juror for his conduct during the jury selection process as excuses, both contradictory and incredible, and particularly questions the Juror's claim that he notified the Jury Office about his felon status. Although the Juror asserts that he neither discussed his conviction nor referred to any prior experience with the criminal justice system during jury deliberations, defendant contends that these assertions cannot be believed and that the Court should discredit the Juror's testimony.

In contrast, the government maintains that, while the Juror has, by his own admission, lied about his felony conviction in the past, he did nothing to corrupt the fairness or impartiality of jury deliberations conducted in this defendant's criminal case. Government counsel also argues that the Juror's

demeanor is critical to evaluating the truthfulness of his assertions of impartiality and stresses the Juror's cooperation in these post-trial proceedings.

Ultimately, the Court is persuaded that the Juror's testimony included no direct evidence of actual bias. Nor did the overall evidence regarding the Juror's prior criminal conviction, the Juror's failure to disclose this felony conviction to the trial court, and the Juror's history of concealing this conviction, constitute sufficient grounds for the court to *infer* the existence of actual bias and unfair prejudice in the jury deliberation process.[6]

During direct examination the Juror stated that he did not reveal his felony conviction to his fellow jurors, nor did he discuss any information or attitudes that he might have acquired as a result of his criminal prosecution and incarceration. *See* 5/20/97 Tr. at 9, 11-12; 28-30 (cross). Even with detailed questioning, defendant failed to demonstrate that any particular element of the Juror's criminal experience—arrest, trial, incarceration or probation—biased the Juror against defendant. *See id.* at 28-30. The only consistent motive offered by the Juror for not disqualifying himself as a potential juror was that he came of age during the Civil Rights movement and desired to exercise his right to serve on a jury. *See id.* at 41.

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[6] *See also McDonough*, 464 U.S. at 558 (Brennan, J., with Marshall, J., concurring) ("Because the bias of a juror will rarely be admitted by the juror himself...it necessarily must be inferred from surrounding facts and circumstances. Therefore, for a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on voir dire honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in this latter determination of actual bias.").

Ultimately, the Court finds that although the hearing records may demonstrate some minor inconsistencies between the Juror's testimony in 1994 and his recollection of events in 1997, the Juror's efforts to cooperate in these proceedings and his claims of impartiality in regards to defendant's trial appear to be genuine. The original trial judge reached a similar conclusion following his dialogue with the Juror in 1994:

> The Court found [the Juror] to be a very credible witness. Nothing in the record even hints that [the Juror's] motivation for not disclosing his felony status was related to actual bias towards the defendants. Nor was it related to any other aspect of the case.

United States v. Boney, Crim. A. 89-381, 1994 WL 907463 (D.D.C. Aug. 18, 1994).

Moreover, although the Court is still concerned by the Juror's history of untruthfulness, this concern is mitigated by the Court's observation of the witness and the Court's independent assessment of his demeanor and credibility at the second evidentiary hearing. The Court is further persuaded by the forthcoming manner in which the Juror answered questions concerning his experience in the criminal justice system and the instances in which he concealed his conviction to gain employment or, as in the case at hand, to have the privilege of sitting on a jury. In each instance, his participation included the protection of personal immunity. Arguably, he had no reason not to speak freely and truthfully about the events of seven years ago or about his prior history in the criminal justice system. In fact, the Juror was particularly candid in admissions concerning his deliberate efforts to "deny," "lie," or "ignore" questions about his felony status in the years following his release from prison. *See* 6/27/94 Tr. at 15-16; 5/20/97 Tr. at 45, 51.

Therefore, the Court is persuaded that the Juror would testify with equal frankness regarding any disclosures he may

have made to other members of the jury. Moreover, if he believed himself to have been susceptible to any of the subtler biases drawn out during cross-examination, the Court is of the opinion that it is reasonable to assume that he would answer truthfully in that regard as well. Accordingly, the Court concludes that the Juror had no actual bias towards defendant.

2. Implied Bias

The Supreme Court has also indicated that in exceptional circumstances bias can be implied or presumed as a matter of law.[7] According to Justice O'Connor, such exceptional circumstances "might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith v. Phillips,* 455 U.S. at 222 (O'Connor, J., concurring) *See also McDonough,* 464 U.S. 548, 558 (Brennan, J., with Marshall, J., concurring) (noting that a court must determine whether factors indicate actual bias or, alternately, whether there are "any facts in the case suggesting that bias should be conclusively presumed") and at 556 (Blackmun, J., with Stevens, J. and O'Connor, J. concurring) noting that bias may be inferred in "exceptional circumstances."

Although, as here, "a juror's refusal to admit his felony status is particularly troublesome," *Boney I,* 977 F.3d at 634, this Court does not find that the circumstances surrounding this case are "exceptional" enough to imply bias as a matter of law.

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[7] Justice O'Connor concurred in *Smith v. Phillips,* noting that "I read the Court's opinion as not foreclosing the use of implied bias in appropriate situations, and, therefore, I concur." 455 U.S. at 224.

D. *POLLING OF THE JURY PANEL*

Finally, the Court must consider the necessity and appropriateness of polling the original jury panel seated for defendant's criminal trial. This polling request, first made by defendant in anticipation of the original trial judge's evidentiary hearing, is noted by the Circuit Court's opinion in *Boney II:* "[D]espite [defendant's] request, the court failed to send a questionnaire to the other members of the jury." 68 F.3d at 501 (referencing hearing transcript dated June 27, 1994 at 25-26).

Notwithstanding its observation, the Circuit Court does not take a position on the propriety of such a request or its permissibility under Fed. R. Evid. 606.[8] Instead, it recognizes the District Court's ability to evaluate this proposal following the completion of a more in-depth evidentiary inquiry:

> [W]e do not reach the issue of whether the judge should have questioned the other jurors on the panel. Based on information that might be elicited from a more thorough inquiry of [the Juror], the judge will be better able to assess the value of questioning the other jurors and to determine whether such questioning would fall within the 'extraneous prejudicial information' exception to Rule 606(b).

Boney II, 68 F.3d at 503.

This Court has independently determined that the Juror's testimony during the remand hearing was credible and that the Juror had no bias, actual or otherwise, towards the defendant. Accordingly, having reached those conclusions, the Court is indeed "reluctant to 'haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.'" *United States v.*

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[8] *See supra* note 1.

Ianniello, 866 F.2d 540, 543 (2nd Cir. 1989) (citation omitted).

Therefore, defendant's polling request is **DENIED.**

ORDER

For the reasons set forth in the accompanying Memorandum Opinion & Order, it is hereby

ORDERED that defendant's motion for a new trial is **DENIED.**

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

UNITED STATES OF America
v.
Jermaine BONEY, Appellant.

Nos. 94-3149.

Argued Sept. 7, 1995.
Decided Oct. 20, 1995.

Before: EDWARDS, Chief Judge, SENTELLE and TATEL, Circuit Judges.

HARRY T. EDWARDS, Chief Judge:

In 1990, defendant-appellant Jermaine Boney was convicted of two narcotics offenses. After the trial, it was discovered that the foreman of Boney's jury, "Mr. J," had previously been convicted for grand theft in California. Such a conviction would have disqualified Mr. J from serving on the jury,[1] but he lied on his juror qualification form, and did not reveal his prior felony at *voir dire*. Boney appealed his conviction, arguing, *inter alia*, that the presence of a felon on the jury tainted the trial and deprived him of his Sixth Amendment rights. A panel of this court affirmed appellant's conviction on all grounds except the juror-bias claim and remanded the case to the District Court to hold an evidentiary hearing to determine

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[1] Under 28 U.S.C. § 1865(b)(5) (1988), a person shall not be qualified to serve on grand or petit juries in the district court if such person "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored."

whether "actual bias" existed so as to justify granting a new trial. *United States v. Boney*, 977 F.2d 624, 634-35 (D.C. Cir. 1992) ("*Boney I*").

On remand, after reviewing questions previously submitted by counsel for both sides, the District Court held a hearing at which the judge examined the felon- juror. The court, however, asked the juror only two, overly general, questions regarding bias, and refused to ask several more probing inquiries submitted by Boney's counsel. The District Court subsequently ruled that the juror's failure to disclose his felon status did not result in actual bias to the defendant, and therefore refused to grant appellant's motion for a new trial. In light of the specific facts of this case, we hold that the court's inquiry was insufficient to assess the potential bias of the juror. Accordingly, we remand for a second evidentiary hearing.

I. BACKGROUND

This appeal arises from Boney's conviction, following a jury trial, for both distribution and possession with the intent to distribute more than five grams of cocaine pursuant to 21 U.S.C. § 841(a) (1988).[2] After the verdict had been returned, counsel for one of Boney's co-defendants received a tip that the jury foreman was a convicted felon. An investigation by the prosecutor confirmed that Mr. J had been convicted of grand theft and taking a vehicle without consent in California. Based on this information, defendants moved for a new trial, claiming that the felon's presence on the jury had violated their Sixth Amendment rights. The District Court denied the motion, and defendants appealed.

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[2] One co-defendant, Jeffrey Marks, was acquitted on both counts, and another, Donald Holloman, was found guilty of distribution, but not possession. Holloman was a co-appellant on the first appeal to this court, but is not a party to the current proceeding.

On appeal, this court held that the Sixth Amendment does not absolutely bar felon-jurors. *Boney I*, 977 F.2d at 633. Rather, the appropriate remedy for an allegation of juror bias is to hold an evidentiary hearing in order to determine whether the juror's failure to disclose his felon status resulted in "actual bias" to the defendant. *Id.* at 634-35. The panel therefore remanded the case to the District Court with instructions to conduct such a hearing.

On remand, the District Court contacted Mr. J, who informed the court that he would invoke his Fifth Amendment privilege against self-incrimination if called to testify at an evidentiary hearing. On the Government's motion, the District Court granted Mr. J statutory immunity. The trial court also decided that counsel would not be permitted to examine the witnesses directly, and instead invited the parties to submit proposed questions to be asked by the judge.

A hearing took place on June 27, 1994. The court first questioned Jury Administrator Jeanine Howard. She testified that, on his Juror Qualification Questionnaire, Mr. J had responded "No" to question six, which asked whether he had ever been convicted of a state or federal crime for which punishment could have been more than one year in prison. Mr. J also responded "Yes" to question seven, which asked whether his civil rights had been restored. These answers were inconsistent because question seven states that it should be answered only if the answer to question six is "yes." Howard testified that, because of this inconsistency, a Jury Office employee contacted Mr. J by telephone to clarify his answers. According to the employee's notation, Mr. J explained that he had mistakenly answered "Yes" to question seven, thus reaffirming that he had never been convicted of a felony and that he had never lost his civil right to serve on a jury. Tr. of Hearing (June 27, 1994) at 5- 7, *reprinted in* Record Excerpts ("R.E.") 65-67.

The court next questioned Mr. J himself, who confirmed that he had pleaded *nolo contendere* to a charge of grand larceny in San Francisco in 1985. Mr. J stated that he had served nine months of a one-year sentence, followed by a probationary period of what "may have been" five years. His civil rights were not restored following his felony conviction. *Id.* at 11-12, *reprinted in* R.E. 71-72.

Mr. J admitted that his answer to question six regarding prior felony convictions was false. He claimed he "was thinking only as a juror in the District of Columbia and not in terms of San Francisco." *Id.* at 13, *reprinted in* R.E. 73. He stated that he answered question seven regarding his civil rights affirmatively because he believed that since his probation had ended, "whatever civil rights needed to be restored may have been restored as of that time." *Id.* at 14, *reprinted in* R.E. 74. Mr. J did not recall a telephone conversation with the Jury Office about his questionnaire responses.

The District Court then questioned Mr. J about his failure during *voir dire* to respond when asked whether he had ever been charged with or convicted of a crime. Mr. J explained:

> Quite frankly, at this point I'm not quite sure of what was going through my head as to why I didn't respond to it.
>
> What I can say in general is once you're charged with a felony and you come out of incarceration, one of the things you condition yourself to do in order to gain employment or get back into mainstream society is deny that you ever served time or to lie about it or to ignore the question, that is, whatever you need to do to gain employment or get in the work force—to get ahead, get back into the system.
>
> I know at that time, that was a part of me going through in order to gain employment, get back on my feet. I learned either to ignore the question or to lie about the question. And, quite frankly, only within the last four years have I

> gotten to the point where I am pretty much up front about the fact that I'm an ex-offender.
>
> But that's only because I'm secure in my place of employment and my employer knows I am an ex-offender.
>
> I guess I'm saying that because I probably just consciously or unconsciously blocked the question.

Id. at 15-16, *reprinted in* R.E. 75-76.

Mr. J further testified that he had never seen or encountered any of the defendants prior to his jury service. The court asked him: "[W]as there anything about any of the defendants ... that caused you to want to serve or want not to serve as a juror in the case?" Mr. J answered, "No, not about any of them, no." *Id.* at 16, *reprinted in* R.E. 76. When asked whether there was "anything else about this case, its nature, or anything about it at all" that caused him to want to serve, Mr. J responded:

> There was nothing specific about the case in and of itself ...; but I think there was probably a desire in terms of my upbringing of being able to serve as a juror as all Americans would like to be able to vote or serve on a jury. From that point of view, yes, but not anything specific about the case itself, no.

Id. at 16-17, *reprinted in* R.E. 76-77.

Finally, Mr. J was asked: "Did you approach your participation as a juror in this case with any sort of bias against any of the three defendants in the case?" to which he responded, "I did not." *Id.* at 17, *reprinted in* R.E. 77.

The court refused to ask a number of questions that Boney's counsel had proposed on the ground that these questions were barred by Federal Rule of Evidence 606(b), which generally precludes jurors from testifying about their "mental processes

in connection" with deliberations.[3] Some of the proposed questions sought to elicit information about Mr. J's comments to other jurors concerning his own experience with the criminal justice system:

> 18. Did you disclose your criminal conviction(s) to any of your fellow jurors? If so, when?
>
> 19. During your discussions with your fellow jurors, did you disclose any information (for example, information about cocaine) that you acquired as a result of your criminal prosecution and sentence? If so, what information did you disclose?
>
> 20. During your discussions with your fellow jurors, did you disclose any attitudes (for example, attitudes about drug defendants) that you acquired as a result of your criminal prosecution and sentence? If so, what attitudes did you disclose?

Def.'s Proposed Questions at 4, *reprinted in* R.E. 53 (footnote omitted).

The court also refused to ask several questions that were designed to elicit information about possible biases relating to Mr. J's felon status:

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[3] Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Fed. R. Evid. 606(b).

21. In the course of your service as a juror, did you want to be helpful to the government?

22. Did your experiences as a convicted felon or as a criminal defendant or as an arrestee affect your votes in the jury deliberation in this case? If so, how?

23. Was one of your reasons for voting to convict Mr. Boney to keep anyone associated with the case from suspecting that you were a felon yourself?

24. Was there any reason, apart from the testimony and other evidence introduced at trial, why you voted to convict Mr. Boney?

Id. at 4-5, *reprinted in* R.E. 53-54.

In addition, despite Boney's request, the court failed to send a questionnaire to the other members of the jury. Tr. at 25-26, *reprinted in* R.E. 85-86.

On August 18, 1994, the District Court issued an order finding that Mr. J's failure to "disclose his felon status did not result in actual bias to the defendants." *United States v. Boney,* Crim. Action No. 89-381, slip op. at 2 (D.D.C. Aug. 18, 1994), *reprinted in* R.E. 2. Accordingly, the court denied Boney's motion for a new trial. In the same order, the court denied appellant's motion for reconsideration of the decision not to ask several of Boney's proposed questions. The court determined that although Federal Rule of Evidence 606(b) permits inquiry into whether extraneous prejudicial information was brought to the jury's attention, such extraneous information "does not include information about a juror's subjective beliefs or status as a felon." *Id.* at 3, *reprinted in* R.E. 3. This appeal followed.

II. ANALYSIS

In remanding the case initially, this court expressed strong concerns about the possible existence of bias and the need for an evidentiary hearing:

> We do not now hold that any false statement or deliberate concealment by a juror necessitates an evidentiary hearing. But we believe that a juror's refusal to admit his felony status is particularly troublesome. Unlike some information sought in *voir dire*, a question about felon status would strike the average juror as extremely serious and sensitive. Lying about a factor as important (and as easy to verify through public records) as felon status raises at least the inference that the juror had an undue desire to participate in a specific case, perhaps because of partiality.

Boney I, 977 F.2d at 634. Given that mandate, the District Court was obligated to conduct a searching inquiry concerning possible prejudices related to his conviction that Mr. J may have carried with him into the jury deliberations. Although trial judges are generally accorded broad discretion in their conduct of juror-bias hearings, that discretion is "'not unlimited.'" *Neron v. Tierney*, 841 F.2d 1197, 1201 (1st Cir. 1988) (quoting *United States v. Corbin*, 590 F.2d 398, 400 (1st Cir. 1979)). For example, the Supreme Court has assumed that such proceedings will at least provide the defendant an "opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). Similarly, in *United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987), this court ruled that, although juror-bias hearings need not be conducted as full evidentiary proceedings, the inquiries put to the juror must be "sufficiently detailed to permit the judge to determine whether any prejudice is likely to [have resulted]." *Id.* at 1196.

Because "sufficiency" is a dynamic concept, and techniques for achieving a sufficiently detailed inquiry may vary, our review of juror-bias hearings is necessarily case-specific.

Neron, 841 F.2d at 1201. The outer limits on the District Court's discretion, therefore, cannot be measured against a fixed set of procedural requirements. Accordingly, our review is limited to determining whether, given the facts before us, the hearing was adequate to reveal any potential bias that might have tainted the verdict.

In this case, several factors pointed to the need for a more serious and thorough inquiry. First, Mr. J undisputedly lied in concealing a felony conviction that, had he told the truth, would have guaranteed his removal from the panel. Second, the appellate panel found that this particular lie raised "at least the inference that the juror had an undue desire to participate in a specific case, perhaps because of partiality." *Boney I*, 977 F.2d at 634. And third, the hearing occurred after the verdict had been rendered, thus removing the usual concern that the interrogation itself might have an effect on the outcome of the trial. *See, e.g., United States v. Williams*, 822 F.2d 1174, 1189 (D.C. Cir. 1987) (expressing concern that individual questioning of jurors "conceivably could jeopardize the accused's rights, for [such questioning during trial] could cause the jurors polled to attach undue significance to the incident").

Given these particular circumstances, we find the District Court's inquiry to be insufficient and an abuse of discretion. The court asked Mr. J only two questions relating to bias: whether anything about the defendants or the case in general caused Mr. J to want to serve as a juror, and whether he approached his participation as a juror with any bias against the defendants. Such a limited inquiry virtually assured that the hearing would fail to discover any possible prejudice. Indeed, the court's questions permitted Mr. J to decide for himself the ultimate issue of whether he was biased rather than seeking information that would permit the court to make its own determination. *See United States v. Rhodes*, 556 F.2d 599, 601 (1st Cir. 1977) (finding that court's "altogether too telescopic" questions as to jurors' exposure to extraneous

materials "let the jurors decide for themselves the ultimate question whether what they had learned had prejudiced them"). Certainly, no skilled attorney conducting a cross-examination to uncover bias would be satisfied with such a cursory approach. *Cf.* FRANCIS L. WELLMAN, THE ART OF CROSS EXAMINATION 38 (1978) (noting that witness errors "should be drawn out often by inference rather than by direct question, because all witnesses have a dread of self-contradiction").

The District Court also took an overly narrow view of the kinds of bias to be examined at the hearing. The questions focused only on possible prejudice against the defendants specifically, and the court refused to probe whether Mr. J might have been motivated by a more general desire to help the government, or whether either his efforts to conceal his felon status or his experiences as a criminal defendant might have influenced him. "Actual bias" can include more than just personal animus against the defendants. After all, it is not unreasonable to believe that a convicted felon might want to help the Government and prove himself a good citizen. In fact, Mr. J's comment that he wanted to serve as a juror like "all Americans" indicates at least the possibility that he was prompted by a desire to prove his patriotism as part of his efforts to rejoin society and put his criminal past behind him. Similarly, he might well have believed that voting to convict would more effectively hide his felon status. The trial court erred in refusing to allow an examination that would reach these issues.

Because a person may not recognize, or admit to, certain subtle biases, it is often only through more specific questions that a person's prejudices are revealed. This rather rudimentary observation underlies our entire adversary system, where cross-examination is considered essential in order to test witnesses for concealed bias. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) (observing that "[c]ross-examination is the

principal means by which the believability of a witness and the truth of his testimony are tested" and noting that a witness' credibility can be attacked "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives"). Even at *voir dire*, when courts routinely ask prospective jurors whether they or any members of their families have ever been the victim of, a witness to, or charged with a crime, the question is intended to locate prejudices that might be unknown to the jurors themselves. The District Court's failure to search, even briefly, for such hidden prejudices rendered the evidentiary hearing a useless exercise that ignored the serious concerns about possible bias expressed by this court in *Boney I*.

While the most important flaw in the evidentiary hearing was the failure to ask more probing questions, we believe the District Court also erred in not permitting Boney's counsel to cross-examine the juror. Although we recognize that in some cases questioning by counsel may be inappropriate because "jurors should not be subjected to undue impositions," *United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990), in this instance there is no apparent reason why counsel for both parties should not be permitted to question Mr. J directly. The proceedings are much more likely to uncover Mr. J's possible biases if the questions are not filtered through the judge, and, given the specific facts of this case, it is unlikely that such an examination will compromise the confidentiality of jury deliberations. In any event, the court would, of course, still retain the authority to rule on objections at the hearing and to strike specific questions deemed to be inappropriate.

Boney also claims that the trial court erred by not querying Mr. J on what happened during jury deliberations, and by not questioning the other jurors on the panel regarding their contacts with Mr. J. The judge refused to ask such questions apparently on the ground that the inquiry would require the jurors to testify regarding the validity of their verdict, in

violation of Federal Rule of Evidence 606(b). Appellant contends that the Rule permits questions regarding "extraneous prejudicial information" and that if Mr. J disclosed any information related to his felony conviction in the jury room, such disclosures would fall within that exception. In light of the fact that Mr. J had no right whatsoever even to serve on the jury, *see* 28 U.S.C. § 1865(b)(5) (1988), it does not seem inappropriate to inquire of him whether his felon status ever came up during jury deliberations, and, if so, the circumstances surrounding that disclosure. Although it is expected that jurors will bring their various life experiences into the jury room, Mr. J's experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. Therefore, any discussion of Mr. J's felon status during deliberations would surely seem to be "extraneous," and possibly "prejudicial" as well.

While we hold that Rule 606(b) does not prohibit further questioning of Mr. J himself, we do not reach the issue of whether the judge should have questioned the other jurors on the panel. Based on information that might be elicited from a more thorough inquiry of Mr. J, the judge will be better able to assess the value of questioning the other jurors and to determine whether such questions would fall within the "extraneous prejudicial information" exception to Rule 606(b).

III. CONCLUSION

For the foregoing reasons, we remand this case to the District Court with instructions to conduct a second evidentiary hearing into Mr. J's possible biases. At this hearing, Mr. J should face a more probing inquiry in order to elicit any prejudice related to his felon status that might have affected the jury's deliberations. In addition, counsel for both sides should be permitted to conduct the direct and cross-examination of the juror. Following the hearing, the

District Court may decide whether to permit questioning of the other jurors on Boney's panel.

So ordered.

**UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.**

United States of America
v.
Jermaine Boney, Appellant.
UNITED STATES OF America
v.
Donald A. Holloman, Appellant.

Nos. 90-3270-, 90-3281.

Argued Feb. 6, 1992.
Decided Oct. 13, 1992.

Before: SILBERMAN, HENDERSON and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Opinion dissenting in part and concurring in part filed by Circuit Judge RANDOLPH.

SILBERMAN, Circuit Judge:

Appellants Donald Holloman and Jermaine Boney appeal their drug trafficking convictions. Both were convicted under 21 U.S.C. § 841(a) for distribution of cocaine, and one, Boney, was also convicted of possession of 12.72 grams of cocaine. Boney claims that the district court erroneously permitted an expert witness to testify as to his guilt. Holloman objects to the district court's failure to give an identification instruction to the jury and contends that the court improperly considered for sentencing purposes the very 12.72 grams of cocaine involved in the possession charge of which he was acquitted. Both appellants assert that their Sixth Amendment right to an impartial jury was violated because after trial it was discovered that one of the jurors was a convicted felon. We affirm on all

issues except the Sixth Amendment juror bias claim. We remand for the district court to hold a hearing into actual bias.

I.

Shortly after midnight on September 12, 1989, an undercover officer of the Metropolitan Police Department, Darrell Young, approached Jeffrey Marks and sought to buy twenty dollars worth of crack cocaine. Marks asked appellant Donald A. Holloman, who was standing a short distance away, to "serve" Investigator Young. Holloman replied that he might not have enough. Marks thereupon called to appellant Jermaine Boney, who was also standing nearby, and told him to "break . . . a piece off the rock." Boney walked to a pickup truck, reached down behind the rear tire, and retrieved a plastic bag which held what Young described as a large off-white rock. Holloman then said that he had enough for the transaction and gave Investigator Young .199 grams of cocaine base of 84% purity. Young, in exchange, gave Holloman a twenty dollar bill with a prerecorded serial number.

After returning to his car, Young radioed members of his arrest team to move in and told them that Holloman was walking toward a nearby gas station. As they approached, one of the arresting officers saw Boney throw a plastic bag under the pickup truck. Another officer retrieved the bag, which contained 12.72 grams of cocaine base of 69% purity. Boney and Marks were arrested at the scene of the sale. Holloman was arrested while standing at the cashier's window in the nearby gas station. Holloman and the cashier were the only people at the station, and the pre-marked twenty dollar bill was on the counter in front of Holloman. Young identified all three suspects at the scene of the arrest.

Marks, Holloman, and Boney were tried before a jury for distributing the .199 grams of cocaine purchased by Investigator Young and for possessing with intent to distribute the 12.72 grams of cocaine found under the truck. The

government introduced expert testimony from Officer David Stroud, who testified concerning the roles and behavior of participants in drug trafficking operations. The government put to Stroud an elaborate hypothetical involving three people performing exactly the same actions as the defendants in this case, in exactly the same location, using the same words, and even the same amounts of cocaine. Stroud testified that the scenario suggested to him a common pattern for a cocaine sale; he gave his opinion on who in the described operation was a "runner," who was a "holder," and who "was going to actually make the sale."

Officer Young, who also testified about the transaction, was cross-examined concerning his ability to see Holloman at night and about his later identification of Holloman. In closing argument, Holloman's counsel pressed the theory that Holloman had been misidentified at the time of the arrest. The court, however, declined to give the jury an instruction describing the difficulties often involved in identification testimony and emphasizing that the government must establish the defendants' identification beyond a reasonable doubt.

The jury, rather puzzlingly, acquitted Marks on both counts, convicted Holloman only of distribution of the .199 grams of cocaine (he was acquitted of possession of the 12.72 grams that police found under the pickup truck), and convicted Boney of both offenses. After the verdict had been returned, but before sentencing, Holloman's counsel received a tip that the foreman of the jury was a convicted felon. An investigation by the prosecutor confirmed that the foreman had been convicted of grand theft and taking a vehicle without consent in California and had been arrested for larceny in Arizona. Boney and Holloman claimed that the felon's presence on the jury had violated their Sixth Amendment rights, and they moved for a new trial. The court denied their motion.

Even though Holloman had been acquitted of the possession charge, the court calculated both Boney's and Holloman's

sentences by aggregating the weight of drugs involved in both counts (.199 grams on the distribution count and 12.72 grams on the possession count). Under the Sentencing Guidelines, that amount of drugs produces a sentencing range of 63-78 months for each defendant. The district court sentenced Boney to 78 months, but gave Holloman credit for accepting responsibility and sentenced him to 63 months.

Boney and Holloman appeal their convictions. Boney contends that Officer Stroud's expert testimony was inadmissible because it was both unhelpful to the jury under Fed. R. Evid. 702 and unduly prejudicial under Fed. R. Evid. 403. Holloman charges that the court erred in refusing to instruct the jury on the issue of identification. Both claim that the presence of a felon on the jury violated the Sixth Amendment and requires a new trial. Finally, Holloman also argues that the district court violated the Due Process and Double Jeopardy Clauses of the Fifth Amendment by calculating his sentence based on the weight of drugs involved in a count on which he was acquitted.

II.

We turn first to Boney's challenge to the expert testimony of Officer Stroud. According to Boney, the hypothetical presented by the prosecutor so closely mirrored the facts in this case that by assigning roles to the individuals in the hypothetical, Officer Stroud essentially gave his opinion that Boney and Holloman were playing those roles in a cocaine sale. Boney asserts that such testimony was not helpful to the jury as required by Fed. R. Evid. 702 and that it was unduly prejudicial under Fed. R. Evid. 403.

We consider appellant's arguments under Rule 702 and Rule 403 separately because only the Rule 702 objection was

preserved at trial.[1] The district court's admission of the expert testimony under Rule 702 is subject to reversal only for abuse of discretion. *See United States v. Dunn*, 846 F.2d 761, 763 (D.C. Cir. 1988).[2] Rule 702 permits expert testimony that "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Under that requirement that expert testimony "assist" the jury (usually referred to as the "helpfulness" requirement), testimony should ordinarily not extend to matters within the knowledge of laymen. Officer Stroud's testimony certainly did not do so. The operations of narcotics dealers repeatedly have been found to be a suitable topic for expert testimony because they are not within the common knowledge of the average juror. See, e.g., *United States v. Boney*, 977 F.2d 624, 629; *Dunn*, 846 F.2d 761, 763 (D.C. Cir. 1988); *United States v. Carson*, 702 F.2d 351, 369 (2d Cir. 1983).

Nevertheless, Boney contends that, although expert testimony on the operations of drug dealers in general may be admissible, Rule 702 prohibits an expert from giving an opinion that a particular defendant played a particular role in alleged criminal activity. His position is that such testimony is barred

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[1] Contrary to the government's assertion, Boney's counsel did raise an objection under Rule 702 at trial. Before Officer Stroud began to testify, Boney's counsel protested that "you really don't need an expert. There is nothing complicated in this case. . . ." He also objected to testimony concerning the defendants' "roles and so forth." Finally, he objected to the government's detailed hypothetical after the prosecutor had described it but before Officer Stroud had answered. These objections were sufficiently specific, *see* Fed. R. Evid. 103, to alert the district court and opposing counsel that appellant's counsel considered expert testimony unhelpful to the jury and thus barred by Rule 702.

[2] Other circuits have stated that a district court's admission of expert testimony will be overturned only if manifestly erroneous. *See, e.g., United States v. Boissoneault*, 926 F.2d 230, 232 (2d Cir. 1991); *United States v. Espinosa*, 827 F.2d 604, 611 (9th Cir. 1987). We understand these circuits to be applying the same test that we apply here.

both because the helpfulness requirement of the rule implicitly prohibits testimony on matters that jurors are expected to infer on their own, and because the testimony comes too close to a direct opinion on guilt or innocence, which would also be proscribed. *See, e.g., United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990). Boney notes that the Second Circuit has expressed "discomfort" with testimony that connects particular defendants to roles in criminal conduct, *see Boissoneault*, 926 F.2d at 233, and has stated that "an expert should not be permitted to testify that the defendant's actions fit a pattern of conduct which the expert had observed in prior narcotics investigations." *United States v. Cruz*, 797 F.2d 90, 96 (2d Cir. 1986).

Officer Stroud did express an opinion about the actions of the defendants in this case—the government's thinly disguised hypothetical did not render his statements a mere abstract assessment of an imaginary scenario.

Nonetheless, Rule 702 does not bar an expert from drawing conclusions in a specific case, including a conclusion that the defendant was involved in illegal activity or playing a specific role in illegal activity. The Rule does not confine an expert to general statements in the field of his expertise; it does not require that any inferences from the facts in the specific case be left to the jury.

Although it may be well that an expert should not draw inferences a jury could make for itself, *see, e.g., Boissoneault*, 926 F.2d at 233, by stating that the defendants' actions fit the pattern of a typical drug sale, Officer Stroud did not draw a conclusion so obvious that it could be thought he invaded the juror's province. *Cf. United States v. Arenal*, 768 F.2d 263, 270 (8th Cir. 1985) (holding that the jury would have been competent on its own to conclude that several samples of cocaine all cut with only one agent were from the same source). His testimony was similar to a statement that a defendant's actions mirrored a common criminal *modus*

operandi—a form of testimony generally allowed. *See United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987); *United States v. Stewart*, 770 F.2d 825, 831 (9th Cir. 1985); *United States v. Maher*, 645 F.2d 780, 783-84 (9th Cir. 1981) (per curiam).

The Second Circuit, however, has objected to such testimony on the slightly different ground that it would be "rather offensive" to allow an expert to approach the ultimate conclusion in the case by testifying that a particular defendant's actions fit a known pattern of criminal conduct. *See United States v. Brown*, 776 F.2d 397, 401 (2d Cir. 1985).[3] Still, it is part of the normal role of the expert not merely to describe patterns of conduct in the abstract, but to connect actions in a specific case to those patterns—sometimes even to the point of testifying that the defendant was involved in criminal conduct. *See, e.g., United States v. Carson*, 702 F.2d 351 (2d Cir. 1983). The Second Circuit's marked ambivalence toward such testimony[4] perhaps reflects a concern that as experts depart

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[3] The *Brown* court nevertheless held that expert testimony concluding that the defendant had played the role of a "steerer" in a narcotics operation was admissible. *See Brown*, 776 F.2d at 401-02.

[4] Although Boney claims that in *Cruz* the Second Circuit barred testimony connecting a specific defendant to a common criminal *modus operandi*, the law in that circuit is not as clear as he suggests. The Second Circuit has stated recently that an "expert may generally suggest inferences that should be drawn from the facts, including inferences embracing the ultimate issue in the case," *Boissoneault*, 926 F.2d at 232 (citation omitted), and has noted that it has "permitted experts to make conclusory statements, based on their experience, that the defendant was involved in illegal drug-related activity." *Id.* at 233 (citing *United States v. Brown*, 776 F.2d 397 (2d Cir. 1985, 1986); *United States v. Young*, 745 F.2d 733 (2d Cir. 1984); and *United States v. Carson*, 702 F.2d 351 (2d Cir. 1983). In fact, the language appellant cites from *Cruz* mischaracterizes the holding in *Brown*, a case in which the Second Circuit refused to find error in the admission of an expert's opinion that a defendant had been playing the role of a "steerer" in a narcotics sale. *See Brown*, 776 F.2d at 401-02.

from general testimony and draw conclusions about criminal conduct in the cases before them, they approach what is generally accepted to be forbidden ground because their opinions verge on conclusions concerning the defendant's guilt.

We say generally accepted but note that that proposition is by no means obvious from examination of the Federal Rules of Evidence. At one time an expert was prohibited from testifying on any ultimate issue to be determined by the trier of fact. *See, e.g., United States v. Spaulding,* 293 U.S. 498, 506 (1935). Rule 704(a) specifically removed that prohibition and now expressly permits expert testimony on "ultimate issue[s] to be decided by the trier of fact." Fed. R. Evid. 704(a). On the other hand, the commentary to Rule 704 states that, despite the change, Rule 702 (and Rule 403) may still be used to exclude "opinions which would merely tell the jury what result to reach." Fed. R. Evid. 704, Note of Advisory Committee on 1972 Proposed Rules. The Fifth Circuit has accordingly regarded the question of guilt or innocence as entailing a legal conclusion rather than an issue for the trier of fact, *see United States v. Masson,* 582 F.2d 961, 964 n.5 (5th Cir. 1978); *see also Owen v. Kerr-McGee Corp.,* 698 F.2d 236, 240 (5th Cir. 1983), and the Ninth Circuit has consistently held that an expert may not give a direct opinion on the defendant's guilt or innocence, although the court has never been specific in its reasoning. *United States v. Lockett,* 919 F.2d 585, 590 (9th Cir. 1990); *United States v. Kinsey,* 843 F.2d 383, 388 (9th Cir. 1988); *United States v. Fleishman,* 684 F.2d 1329, 1335-36 (9th Cir. 1982). That position would seem supported by Rule 704(b), which bars an expert from testifying that the defendant had "the mental state or condition constituting an element of the crime charged," Fed. R. Evid. 704(b). An opinion that the defendant is guilty necessarily incorporates a conclusion that the defendant had the requisite mental state to meet all elements of the offense. Although the overlapping nature of the provisions treating expert testimony can

understandably produce some confusion[5] regarding the precise rule to be relied on to exclude an opinion as to guilt, we agree that a direct opinion on guilt or innocence would be barred and that Rule 702 is a plausible vehicle for challenging such testimony.

Appellant's contentions, however, would require us to go further. Appellant essentially argues that if we accept the general view—that an expert witness must not testify directly as to a defendant's guilt or innocence—we are led inexorably to the Second Circuit's episodic objection to testimony that is the functional equivalent of the forbidden. We disagree. We accept the Fifth and Ninth Circuits' view that an expert may not testify on the ultimate question of guilt or innocence, but find no warrant in the Federal Rules to extend that prohibition. We think that no coherent line can be drawn beyond that restriction and that the effort to find such a boundary has caused the tension we perceive in the Second Circuit's opinions.

Officer Stroud's testimony, which at most matched particular defendants and their actions with paradigm roles in an illegal enterprise, does not amount to a direct opinion on the defendants' guilt. *See Fleishman*, 684 F.2d at 1335-36; *United States v. Masson*, 582 F.2d 961, 964 & n.5 (5th Cir. 1978). Concluding that a defendant's actions (as described by the prosecutor) suggest that the defendant played a given role in a criminal enterprise is not the same as telling the jury that the government has proved every element of its case and that the defendant is guilty as charged.

Indeed, in *United States v. Dunn*, 846 F.2d 761 (D.C. Cir. 1988), we permitted testimony similar to Officer Stroud's.

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[5] That confusion was apparent in this case, for while appellant relied solely on Rules 702 and 403 in pressing his appeal, the government responded as if appellant's argument had been based on Rule 704(b).

There an expert concluded that the nature of activities in a townhouse suggested "a retail operation used for the everyday distribution, distributing of primarily crack and heroin." *Id.* at 762. Officer Stroud similarly opined that the actions described in this case suggested a "runner and holder" type of drug sale and that appellants' actions fit certain roles in the "runner and holder" operation. In *Dunn,* we did not read Rule 702 to bar the expert's conclusion that the facts described an illegal drug operation. The addition in this case of somewhat more specific treatment of individual roles does not warrant a different result under the Rule, and, therefore, we reject appellant's claim.

Nevertheless, we echo here the cautionary note we sounded in *United States v. Anderson:* "[T]here is often an inherent danger with expert testimony unduly biasing the jury 'because of its aura of special reliability and trust.'" 851 F.2d 384, 393 (D.C. Cir. 1988) (quoting *United States v. Amaral,* 488 F.2d 1148, 1152 (9th Cir. 1973)). We note that in cases such as this, it is within the trial court's discretion to exclude under Fed. R. Evid. 403 expert testimony that goes beyond a description of criminal *modus operandi* in general and assigns specific roles to individual defendants if the court deems it unfairly prejudicial.

In this case, however, Boney did not ask the trial judge to exercise discretion under Rule 403. Although Boney argues on appeal that Stroud's testimony was inadmissible under Rule 403, his objections at trial were not specific enough to raise that issue. Our recognition of the threat expert testimony may pose for "unduly biasing the jury," *Anderson,* 851 F.2d at 393, does not mean that every objection to expert testimony automatically includes an objection that the testimony is unduly prejudicial under Rule 403. Precisely because Rule 403 requires the trial court to undertake a subtle balancing to determine whether the probative value of the evidence outweighs its prejudicial effect, the trial judge must be alerted to the need to balance by a timely and specific objection.

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Even though appellant did not preserve an objection under Rule 403 at trial, we still must review admission of the expert testimony for plain error, *see* Fed. R. Evid. 103(d), which means we cannot reverse "other than in extraordinary circumstances 'affect[ing] substantial rights and result[ing] in a miscarriage of justice.'" *United States v. Johnson*, 802 F.2d 1459, 1465 (D.C. Cir. 1986) (quoting *United States v. Johnson*, 722 F.2d 407, 409 (8th Cir. 1983)). It is difficult to imagine a Rule 403 challenge that could meet this exacting standard, for Rule 403 contemplates the thoughtful consideration of the trial court and leaves the admission of evidence to the sound discretion of the trial judge. As the Third Circuit stated in *United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978), "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." In any event, in this case we think the district judge could quite reasonably have thought the value of Stroud's testimony connecting the defendants to identifiable roles in a drug sale outweighed its prejudicial effect. And, in hindsight it seems rather clear that whatever prejudicial impact the testimony may have carried, it did not overly influence the jurors, for despite Stroud's suggestion that 157 Marks had been the "runner" in this drug operation, the jury acquitted Marks on both counts.

III.

Appellant Holloman argues that the district court erred in refusing to instruct the jury on the issue of identification. He claims that when identification is a prominent issue, our decisions in *Salley v. United States*, 353 F.2d 897 (D.C. Cir. 1965), and *Macklin v. United States*, 409 F.2d 174 (D.C. Cir.

1969), oblige a district court to give an identification instruction when one is requested.[6]

In *Salley* we held that it was reversible error for the district court to refuse the defendant's request for an instruction on mistaken identification. *See Salley*, 353 F.2d at 898-99. But in *Jones v. United States*, 361 F.2d 537 (D.C. Cir. 1966), we "emphasized the narrow limitations of our ruling in *Salley*," *id.* at 542, and restricted the holding to fact patterns that revealed some special difficulty in the identification. *Salley* presented just such complications because there "an undercover narcotics agent attempt [ed] to isolate in his recollection the identity of one participant in as many as a 100[sic] similar transactions." *Jones*, 361 F.2d at 542.

Our holding in *Macklin* was similarly limited. Although we said that in cases in which identification is a major issue the court should instruct the jury on identification *sua sponte*, *see Macklin*, 409 F.2d at 178, our suggestion must be read as precatory. We have not subsequently reversed a district court for failing to offer such an instruction unless particular difficulties complicated the identification testimony in the case. Thus, in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir.

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[6] The government argues that appellant Holloman did not properly object to the jury instruction at trial. In fact, Holloman's counsel effectively objected to the instruction twice. Before the charge was given, Holloman's counsel stated that she would make objections on behalf of all three defendants and that counsel for Marks and Boney would "chime in." Counsel for Boney then objected to the decision not to give an identification instruction. The earlier statement by Holloman's counsel was sufficient, however, to alert the court that all three defendants were joining each other's objections. Furthermore, after the charge had been given, but before the jury retired, the trial court allowed another opportunity for objections. Counsel for Holloman then clearly objected to the lack of an identification instruction. Because Fed. R. Crim. P. 30 requires only that an objection to the charge be raised before the jury retires to consider its verdict, Holloman's objection was sufficient.

1972), we analyzed the "prejudice inherent in the failure of the trial court to offer" an identification instruction, *id.* at 555-56, but declined to reverse because the "case exhibit[ed] none of the special difficulties often presented by identification testimony that would require additional information be given to the jury in order for us to repose confidence in their ability to evaluate the reliability of the identification," *id.* at 556. The Fourth Circuit thus summarized our cases accurately when it stated that the instruction is "compelled" only when there are "special difficulties," *United States v. Brooks*, 928 F.2d 1403, 1406 (4th Cir. 1991)—in the absence of such circumstances the failure to instruct is not error.

Officer Young's identification of Holloman in this case presented no special difficulties. Young executed a single transaction face to face with Holloman in an area lit by streetlights. Within minutes he radioed a description of Holloman to his team, and shortly thereafter he identified Holloman at the scene of the arrest.

IV.

Boney and Holloman also argue that the district court erred in refusing to grant their motion for a new trial in light of the discovery, after conviction but before sentencing, that one of the jurors in their trial was a felon. The appellants contend that in this situation the Sixth Amendment guarantee of an impartial jury requires a new trial. They urge us to interpret the Sixth Amendment in light of 28 U.S.C. §§ 1865-1867 which govern the jury selection process.

The appellants eschew direct reliance on 28 U.S.C. §§ 1865-1867 because the statutory remedy would appear time-barred. We think the statute is inapplicable to the appellants, but not just because their objection to a juror who concealed his felon status was untimely. Rather, 28 U.S.C. §§ 1865-1867 do not help appellants because those provisions address a different problem—the procedures by which the district court should

administer the jury selection process. Section 1865 requires a district court official to exclude certain groups of jurors, including both convicted felons and individuals accused of a felony, pursuant to status-based disqualifications. 28 U.S.C. § 1865(b)(5). But § 1867 establishes strict procedural limitations on the ability of parties to raise objections to the jury selection process. Subsection 1867(a) allows the defendant to object "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. § 1867(a). And subsection 1867(e) emphasizes that the § 1867 procedures constitute the "exclusive means" by which parties can challenge the jury for improper selection. 28 U.S.C. § 1867(e). These provisions do not apply directly to our case, however, because when a juror fails to disclose his felon status on the jury qualification form, no defect in the court's jury selection process occurs.

Insofar as 28 U.S.C. §§ 1865-1867 are relevant to our analysis, moreover, they counsel against any rule that would lead to automatic reversal. The statutory scheme permits a conviction to stand in the face of an untimely allegation that the district court allowed a felon juror to serve in violation of the proper jury selection process. For example, if a juror acknowledged his felon status on the jury qualification form but was permitted to serve in violation of § 1865, § 1867 would bar an untimely challenge to his service. *See, e.g., United States v. Uribe*, 890 F.2d 554, 561 (1st Cir. 1989) ("Like so many statutory rights, the right to exclude felons must be affirmatively invoked."). To be sure, § 1865 evinces a congressional purpose to restrict the service of felons on juries. The strict procedural limitations of § 1867, however, make abundantly clear that other values, such as judicial efficiency and finality, tempered Congress' desire to bar felon-jurors and led Congress to reject a rule of *per se* reversal.

The Sixth Amendment right to an impartial jury similarly does not require an *absolute bar* on felon-jurors. The Supreme Court has stressed repeatedly that the touchstone of the guarantee of an impartial jury is a protection against juror bias. *See, e.g., McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554 (1984).[7] A *per se* rule would be appropriate, therefore, only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias. In fact, as the dissent suggests, Congress' purpose in restricting felons' jury service may stem from considerations other than a concern for biased jurors. Dissent at 637-38. More important, a *per se* rule requiring a new trial whenever it turns out that a felon served on a jury seems inconsistent with McDonough's hostility to unnecessary new trials, *id.* at 553-54 and the oft-repeated axiom that "[a defendant] is entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U.S. 604 (1953). We think, therefore, that the Sixth Amendment guarantee of an impartial trial does not mandate a *per se* invalidation of every conviction reached by a jury that included a felon. *Accord United States v. Uribe,* 890 F.2d 554, 562 (1st Cir. 1989); *United States v. Currie,* 609 F.2d 1193, 1194 (6th Cir. 1979) (per curiam); *Ford v. United States,* 201 F.2d 300, 301 (5th Cir. 1953); *cf. Raub v. Carpenter,* 187 U.S. 159, 163 (1902) (denying a motion for a new trial in a civil case).[8]

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[7] Although *McDonough* involved a juror's failure to disclose information during the *voir dire* examination in a civil case, we have applied *McDonough* to criminal trials. *See United States v. North,* 910 F.2d 843, 904 (D.C. Cir. 1990) (1991).

[8] The dissent finds support for a *per se* rule in the power of a trial judge to strike jurors for cause and grant a new trial in the interests of justice. Dissent at 639; 643. That the trial judge possesses this power does not suggest that it was error for him to decline to exercise it. Our review of that decision is governed by the abuse of discretion standard. The dissent, however, would use the existence of the trial judge's discretion to fashion a rule promulgated by the court of appeals—a rule which permits a

Even though the Sixth Amendment does not require automatic reversal, there is still the question whether appellants were entitled to a hearing to determine whether the juror was in fact biased. Although the discovery of the juror's felon status does not by itself require a new trial, we think the juror's failure to disclose his status in response to the *voir dire* examination presents serious added concerns. After all, lying or failing to disclose relevant information during *voir dire* itself raises substantial questions about the juror's possible bias. While refusing to adopt a *per se* rule requiring a new trial in *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), we recognized the seriousness of a juror's deliberate concealment of relevant information during *voir dire*. We assumed that a district court should grant a new trial upon a showing of actual bias and affirmed the district court's denial of a motion for a new trial because it had held an evidentiary hearing and found no bias. *Id.* at 904-05; *see also United States v. Currie*, 609 F.2d 1193, 1194 (6th Cir. 1979) (per curiam) (affirming the district court's denial of a motion for a new trial after an evidentiary hearing determined that those jurors who had lied about their felon status were not biased against the defendant) (1980).

In this case, however, the district court judge denied the defendant's motion for an evidentiary hearing. To be sure, our reliance in *North* on the district judge's evidentiary hearing did not settle the question whether a hearing is *required* when it is revealed after trial that a juror had concealed relevant information. The Supreme Court, likewise, has not directly faced this issue, but it has noted the general principle "that the

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defendant to challenge his conviction, because a felon sat on his jury, at least at any time before judgment is entered and presumably later through a post-judgment motion for a new trial or on direct appeal and perhaps years later under § 2255. *See* 28 U.S.C. § 2255. That appears to be straightforward federal policymaking, which we think is reserved to Congress.

remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209 (1982). We think the district judge was obliged to conduct such a hearing here. *Cf. Hard v. Burlington N.R.R.*, 812 F.2d 482, 484 (9th Cir. 1987) (ruling that, under the facts of that case, the district court's failure to grant an evidentiary hearing about juror dishonesty was an abuse of discretion). We do not now hold that any false statement or deliberate concealment by a juror necessitates an evidentiary hearing. But we believe that a juror's refusal to admit his felony status is particularly troublesome. Unlike some information sought in *voir dire*, a question about felon status would strike the average juror as extremely serious and sensitive. Lying about a factor as important (and as easy to verify through public records) as felon status raises at least the inference that the juror had an undue desire to participate in a specific case, perhaps because of partiality.[9] Because the record provides no evidence that the motivation for the lie was unrelated to bias in this case, it was an abuse of discretion under these facts for the trial judge not to have held an evidentiary hearing.

We therefore remand this case for the district court to hold an evidentiary hearing to determine whether the juror's failure to disclose his felon status resulted in actual bias to the appellants.

V.

Appellant Holloman also claims that his sentence was improper. Although Holloman was convicted only of distribution of .199 grams of cocaine and acquitted of

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[9] All other things equal, the likelihood that a juror who conceals information is biased increases with the likelihood that disclosure of the information will lead to his disqualification. Because the disclosure of a felon status during trial leads to almost certain disqualification, concern about concealing that status is particularly appropriate.

possession with intent to distribute the 12.72 grams that Boney had under the pickup truck, the presentence report aggregated the two amounts of cocaine and calculated an offense level based on the combined weight of 12.919 grams. The offense level determined a sentencing range of 63 to 78 months, well within the statutory maximum of 20 years set by 21 U.S.C. § 841(b)(1)(C), but far above the range of 10 to 16 months that would have applied had only the .199 grams been used to calculate the offense level.

The district court, finding by at least a preponderance of the evidence that Holloman also possessed the 12.72 grams of cocaine discovered under the pickup truck,[10] considered that "relevant conduct" under § 1B1.3(a) of the Guidelines and sentenced Holloman to 63 months. Had Holloman been convicted on the possession with intent to distribute count, the same sentencing range of 63 to 78 months would have applied. Holloman argues that the Sentencing Guidelines do not permit consideration of the drugs involved in the count on which he was acquitted. And he contends that by considering those drugs in sentencing and by giving him the same sentence that he could have received had he been convicted on both counts, the district court violated the Double Jeopardy and Due Process Clauses of the Fifth Amendment.

The appellants' argument is offered in the face of overwhelming prior judicial rejection; a full ten circuits have authorized the use of acquitted conduct in sentencing under the Sentencing Guidelines. *See United States v. Coleman*, 947 F.2d 1424, 1428-29 (10th Cir. 1991); *United States v. Rivera-Lopez*, 928 F.2d 372, 372-73 (11th Cir. 1991) (per curiam); *United States v. Fonner*, 920 F.2d 1330, 1332-33 (7th Cir. 1990); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990); *United States v. Rodriguez-Gonzalez*, 899 F.2d

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[10] In fact, the sentencing court suggested that Holloman's possession of the 12.72 grams of cocaine had been shown beyond a reasonable doubt.

177, 180-81 (2d Cir. 1990); *United States v. Dawn*, 897 F.2d 1444, 1449-50 (8th Cir. 1990); *United States v. Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Isom*, 886 F.2d 736, 738-39 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989); *United States v. Ryan*, 866 F.2d 604, 608-09 (3d Cir. 1989). Only the Ninth Circuit, over a strong dissent by Chief Judge Wallace, has rejected the use of acquitted conduct in sentencing, and it did not rest its decision on constitutional grounds. *See United States v. Brady*, 928 F.2d 844, 851-52 & n.14 (9th Cir. 1991).

The "relevant conduct" upon which the Guidelines require that an offense level be based is, for drug related offenses, sweepingly defined to include "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). That language is certainly broad enough to include acts underlying offenses of which the defendant has been acquitted. Indeed, the application notes make clear that conduct may be relevant for sentencing even if the defendant was not convicted on *any* count involving that conduct. *See id.* § 1B1.3, Commentary Application Note 2. Section 6A1.3(a) of the Guidelines allows a broad range of information to be used in sentencing and requires simply that the information have "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). Congress also has endorsed an expansive view of the information that may be used in sentencing: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. We will, therefore, leave the Ninth Circuit in isolation on this issue and join, instead, the other ten circuits

in holding that Sentencing Guidelines allow the use in sentencing of conduct underlying acquitted counts.[11]

Holloman's constitutional challenges are not significant. Holloman argues that use of the acquitted conduct to enhance his sentence violated the Double Jeopardy Clause by punishing him for an offense of which he was acquitted. Even assuming that the Double Jeopardy Clause, rather than the Due Process Clause, would protect a defendant from being sentenced for a charge of which he was acquitted, Holloman's argument "misperceives the distinction between a sentence and a sentence enhancement." *Mocciola*, 891 F.2d at 17. The district court did not impose a separate sentence on Holloman for the possession count. Rather, it considered the drugs involved in that count to enhance his sentence within the statutory range for the distribution offense of which he was convicted: "the acquitted conduct merely affected the point within the statutory range at which his sentence was imposed." *Rodriguez-Gonzalez*, 899 F.2d at 181. In the absence of a separate punishment for the acquitted conduct, Holloman does not have an arguable claim based on the Double Jeopardy Clause.

Holloman's due process argument is based on the false assumption that his acquittal is equivalent to a finding of complete innocence. But a not guilty verdict simply indicates that guilt was not proved beyond a reasonable doubt; it does not establish that the defendant played no part in the charged conduct. *See, e.g., Fonner*, 920 F.2d at 1332; *Isom*, 886 F.2d at 738; *cf. United States v. One Assortment of 89 Firearms*,

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[11] Relying on the above provisions we have already approved the use in sentencing of the weight of drugs involved in uncharged criminal conduct and dismissed counts. *See United States v. Chaikin*, 960 F.2d 171, 174 (D.C. Cir. 1992); *United States v. Salmon*, 948 F.2d 776, 778 (D.C. Cir. 1991). Similarly, we have allowed the use in sentencing of evidence seized in violation of the Fourth Amendment. *See United States v. McCrory*, 930 F.2d 63, 67-69 (D.C. Cir. 1991). Conduct underlying an acquittal does not require different treatment under the Guidelines.

465 U.S. 354, 361-62 (1984). Conduct underlying the acquittal may be used in sentencing as long as it is proved by a standard that satisfies due process. Although Holloman's assertions imply that the Constitution requires proof beyond a reasonable doubt in sentencing, it is well established that "due process is satisfied so long as facts necessary for sentencing are proved by a preponderance of the evidence." *United States v. Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989); *see also McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (approving the same standard in the context of state sentencing). Because the sentencing court found by at least a preponderance of the evidence that Holloman possessed the 12.72 grams of cocaine, it committed no constitutional error in considering that cocaine to enhance his sentence.

Admittedly, Holloman received the same sentence he would have had if he had been convicted on the possession count. That result is rather anomalous and is certainly unlucky from Holloman's perspective, but it is not unconstitutional. Neither due process nor the Double Jeopardy Clause requires that a defendant convicted on multiple counts under the same statute receive a different sentence from a defendant convicted on only one count. The result in Holloman's case is merely a consequence of Congress' decision to make both distribution and possession with intent to distribute the same substantive offense under 21 U.S.C. § 841(a) and to base sentencing on the weight of drugs involved.

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Accordingly, we reject all of the challenges the appellants raise against their convictions except their argument that the Sixth Amendment requires an evidentiary hearing to determine whether a juror's failure to disclose his felon status resulted in actual bias against the appellants. We remand to the district court to hold such a hearing.

It is so ordered.

RANDOLPH, Circuit Judge, dissenting in part and concurring in part:

I do not agree with my colleagues' assessment of what consequences flow from the discovery, after a jury trial, that the foreman of the jury happened to be a recently-convicted felon. Assuming that the juror's civil rights have not been restored, I would reverse the convictions and require a new trial. In my view, the status of the juror as a felon plus the juror's deception of court and counsel during *voir dire* demonstrates that this individual could not be trusted to conform to the court's instructions and to discharge faithfully his duties as a juror.

I also write separately with respect to the question whether the Double Jeopardy Clause forbids a district court from calculating a defendant's sentence for committing one drug offense in light of the quantity of drugs involved in a charge of which the defendant was acquitted. Although I agree with the result my colleagues reach, the case is close and I believe the effect of our ruling on the nullification power of the jury ought to be brought out in the open.

A. THE FELON-JUROR

My colleagues apparently view the felon-juror's deceptive silence on *voir dire* as the source of the problem. They treat this case as if it is governed by *United States v. North*, 910 F.2d 843, 904 (D.C. Cir. 1990), which held that when a juror has made a false statement on *voir dire*, "an aggrieved party must show that the juror's correct response ... would have demonstrated actual bias." *North* interpreted *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). In both cases, jurors had incorrectly answered a question on *voir dire*, in *North* deliberately, in *McDonough* inadvertently. A correct answer in each case would have revealed the possibility of actual bias, of the juror's favoring or disfavoring

one side for reasons other than the weight of the evidence.[12] But "bias" is not the problem here.

Felons are disqualified from serving on juries in both criminal and civil cases. 28 U.S.C. § 1865(b)(5). It is not their "bias" that disables them. The Jury Selection and Service Act of 1968 (the Act), 28 U.S.C. §§ 861-1878, excluded felons to preserve the "probity" of the jury. H.R. Rep. No. 1076, 90th Cong., 2d Sess. 6 (1968).[13] It broke no new ground in doing

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[12] *McDonough* was a civil action for damages arising from an allegedly defective product. Counsel had asked the prospective jurors whether they or any member of their family had ever been "seriously injured" by a defective product. One juror had remained silent even though his son's leg had been broken when a tire exploded. It later turned out he did not consider the broken leg a "serious" injury. In *North*, a criminal case, one juror did not speak up when the court asked the jury panel if they or any members of their families had ever been convicted of a crime, though one of this juror's brothers had been convicted.

[13] Section 1865 provides in pertinent part that:

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for . . . jury service.

. . .

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand or petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable

so. The ancient Greeks barred criminals termed "infamous" from serving on juries. Special Project, *supra* note 2, 23 VAND. L. REV. at 941 n.1. Blackstone cites COKE'S INSTITUTES for the proposition that a felon may not serve on a jury. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361-63; *see also* 4 W. BLACKSTONE, *supra*, at 352. At common law, felons were barred from American juries, and most states now have statutes to this effect, though many (like section 1865) provide that a felon may serve if he has been rehabilitated formally into society. Special Project, *supra*, 23 VAND. L. REV. at 1054. Though the exact reasons for this ancient disability are not crystal clear, none of the proposed explanations involve "bias." *Id.* at 941-50, 1051. Rather, they have ranged from the idea that a criminal has "declared war upon the community," *id.* at 942, and so should be cast out of it as punishment, to the dubious notion that adding this particular bar to the broad array of other post-incarceration sanctions would increase deterrence of crime, *id.* at 944-45. Felons' exclusion from juries may also have developed from an earlier exclusion of felons as witnesses, *id.* at 1051, a practice that continues in milder form to this day. *See* Fed. R. Evid. 609. As Aristotle saw it, to serve on a jury was to hold public office; the capacity to do so was constitutive of being a citizen. Politics, Bk. III 1275a.

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by imprisonment for more than one year and his civil rights have not been restored.

The exclusions have been thus enumerated since 1948. Act of June 25, 1948, ch. 646, 62 Stat. 869, 952. Prior to that time, the qualifications for a juror in federal court were those for a juror in the highest court of the state in which the federal court sat. *See* H.R. REP. NO. 1652, 95th Cong., 2d Sess. 5 & n.4 (1978), U.S.Code Cong. & Admin. News 1978, pp. 5477, 5478 n.4; *see also* § 29 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 88. Though I have not undertaken a survey, it is probable that felons were excluded from jury service in all of those courts. *Cf.* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1051 (1970).

Where all this should lead today is not altogether certain. The defendants think the congressional determination of unfitness conclusively establishes that the presence of a disqualified felon denies them the "impartial jury" guaranteed by the Sixth Amendment. The government objects that section 1865 has no bearing here because Boney and Holloman failed to comply with the time limits set forth in section 1867(a). This requires a criminal defendant to raise alleged violations of the Act "before the *voir dire* examination begins, or within seven days after [he] discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier. . . ." U.S.C. § 1867(a).[14] Neither side has it exactly right.

The extent to which the "jury" requirement of the Sixth Amendment (and Article III) immutably incorporates the common-law bar to service by a felon is unclear. *United States v. Wood*, 299 U.S. 123 (1936), stands for the proposition that

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[14] The government also claims the defendants waived their argument because, in their motion for a new trial on the basis of the felon-juror, they did not specifically cite § 1865 to the district court. I think the issue was preserved. Though defendants did not cite § 865, they certainly made clear the basis of their objection. The proposition that felons should be excluded from juries is not a novel one, and could not have come as a surprise to the district court. The government itself cited § 1865, invoking and relying on cases from other circuits discussing the provision. Government's Opposition to Defendants' Motion for a New Trial at 4-5 & n.2 (filed Aug. 15, 1990). The district court therefore had the statute before it, and we may properly consider it. *Cf. Duignan v. United States*, 274 U.S. 195 (1927). An additional consideration impels this course. To hold the statute "waived" would lead directly to defendants' constitutional argument. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944), *quoted in Jean v. Nelson*, 472 U.S. 846, 854 (1985); *see also Rescue Army v. Los Angeles*, 331 U.S. 549, 570-75 (1947); *Ashwander v. TVA*, 297 U.S. 288 (1936) (Brandeis, J., concurring).

though the "settled rule[s] of the common law," *id.* at 141 may have been "embedded in the Sixth Amendment," *id.* at 137, congressional implementation or modification of those rules should be respected by the courts. *Id.* at 142-43. I would therefore reject the defendants' argument that the Sixth Amendment itself bars felons from serving on juries and requires reversal *per se* where one slips through. What federal law, informed by historical practice and Congress' enactment on the subject may require, is a different question.

As to the government's objection, the time limits of section 1867(a) cannot be read to allow a felon, barred under section 1865(b)(5), to sit on a jury whenever no one objects prior to the start of *voir dire*. Those time limits did not revoke a litigant's time-honored right to challenge a prospective juror for cause. No one would suppose that upon the discovery of a felon on *voir dire* the court could not exclude him because the time for doing so had passed. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 383 (1982). Another provision of the Act, 28 U.S.C. § 1866(c)(4), expressly confirms the court's power to strike venire members "upon a challenge by any party for good cause shown." The Act imposes no time limits on the exercise of this authority, an authority derived from the inherent power of the federal courts to provide for the conduct of their criminal trials, and a source of protections in excess of those required by the Constitution. *Murphy v. Florida*, 421 U.S. 794, 797-98 (1975); *Marshall v. United States*, 360 U.S. 310, 313 (1959); *see also United States v. Provenzano*, 620 F.2d 985, 995-96 (3d Cir. 1980). The inquiry into how that power ought to be exercised in response to a particular challenge is properly guided by the policies and practices underlying and incorporated in the Sixth Amendment, as well as those underlying the basic juror qualifications adopted by Congress in section 1865. *Cf. United States v. Olano*, 934 F.2d 1425, 1438-39 (9th Cir. 1991), *cert. granted*, 504 U.S. 908 (1992).

There is no reason to suppose that the time limits of section 1867 were meant to work a wholesale (and absurd) limitation of that power. Nothing magical happens at the moment *voir dire* begins. A felon's character is not suddenly altered, a juror completely unfamiliar with the English language does not suddenly become fluent. At any rate, the Jury Selection and Service Act primarily concerns how prospective jurors are selected; its purpose was to ensure that venires reflect a "fair cross section of the community," 28 U.S.C. § 861, by replacing the old "key man" system of selection with a more neutral methodology. S. REP. NO. 891, 90th Cong., 1st Sess. 9-12 (1967). Challenges to the way in which the venire was chosen are unlikely to be aided by any information gained by individually examining prospective jurors. The qualifications set out in section 1865 are a different matter. Whether a juror is unable to speak English, section 1865(b)(3); is under the age of 18, section 1865(b)(1); is physically or mentally infirm, section 1865(b)(4); or is a convicted felon, section 1865(b)(5), are all susceptible to detection upon questioning of the individual. Congress also supposed that trial judges retained the power to exclude section 1865(b)- unqualified jurors by "check[ing] in court whether the qualification determinations made up to that point were valid," and eliminated as "redundant" a section so providing in the bill leading to the Act. S. Rep. No. 891, *supra*, at 32 n.33. Congress thought "that power [was] not limited by any time requirement." *Id.*

The time limits of section 1867(a) thus do not absolutely preclude a challenge, based on the fact that the panel contained an individual disqualified by section 1865(b), just because that challenge was made after the start of *voir dire*. This comports with the longstanding practice of replacing an original juror with an alternate during the trial when the original juror is determined to be unqualified. *See, e.g., United States v. Gottfried*, 165 F.2d 360, 365 (2d Cir. 1948) (L. Hand, J.). *See* Fed. R. Crim. P. 24(c). It is also assumed by Rule 23, which allows a court "to excuse a juror for just cause after the jury

has retired to consider its verdict," and which provides that "a valid verdict may be returned by the remaining 11 jurors." Fed. R. Crim. P. 23(b). If a disqualified juror is impanelled in spite of the parties' diligent efforts,[15] the trial judge is not thereby deprived of the power to take corrective action when the relevant facts come to light.

I therefore move on to the defendants' argument for vacating their convictions. Supreme Court precedent of old vintage, cited by neither side, seems to point against their position. In *Raub v. Carpenter*, 187 U.S. 159 (1902), a civil case, a juror stated on *voir dire* that he was over twenty-one and had not been convicted of any crime. Both statements proved to be false. The Court determined, however, that the verdict was the only one that "could be rendered consistently with the facts"; the presence of the felon-juror therefore could not have prejudiced the appellants. 187 U.S. at 163. The Court then addressed the contention that the judgment was a nullity for want of power to enter it. Citing *Kohl v. Lehlback*, 160 U.S. 293, 302 (1895), which held that a verdict was not "void" though rendered by a jury including an alien subject to challenge *propter defectum*, *Raub* stated that the judgment

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[15] Diligence distinguishes this case from *United States v. Uribe*, 890 F.2d 554 (1st Cir. 1989), relied on by the government. There, the felon who eventually made it onto the jury had disclosed his status on a juror qualification form, which, although available to the defendants under a local rule, was not examined by them until after the verdict was in. *Id.* at 561. While the *Uribe* court wrote broadly, to cover situations where the juror's status was "unknowable," the decisional facts did not present that circumstance. Unlike *Uribe*, the juror here acted deceptively, concealing his status on *voir dire;* the government does not suggest anything defendants reasonably should have done to uncover this deception before the verdict. This case differs from *Uribe* in another significant respect. When it comes to capacity for conforming to law, felons are in a suspect class. If a particular felon-juror practices deception on *voir dire* (which the juror in *Uribe* did not), the suspicion concerning felons as a class is confirmed with respect to that particular individual.

below was "not . . . absolutely void," 187 U.S. at 164. (*Kohl* had presented—on habeas—the question whether a New Jersey statute was contrary to the New Jersey Constitution. The Court noted either the New Jersey courts had concluded otherwise, or they had not been asked, and declined to hold that application of the state statute, in light of provisions of the state constitution, violated federal due process or equal protection. 160 U.S. at 302-03.) *Raub* rested on the fact that, since a directed verdict could have been entered, the plaintiff could not possibly have been prejudiced by the juror's presence. The premise does not hold in this case, *see Sparf and Hansen v. United States*, 156 U.S. 51, 105-06 (1895), so the conclusion need not control. Two courts have nevertheless read *Raub* and *Kohl* as requiring a showing of actual bias or actual prejudice to the defendant before a new trial may be granted. *United States v. Currie*, 609 F.2d 1193, 1194 (6th Cir. 1979); *Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953).

A middle ground, one suggested by *North*, is to remand for a hearing on the prejudicial effect of the felon-juror's presence. This is my colleagues' solution. The difficulty is that the hearing, if it got off the ground, would go but a short distance. What would be the nature of the inquiry? Whether the felon actually was able to render adequate service as a juror? Apart from the felon himself, who could be called as a witness? Not the other jurors. Rule 606(b), Fed. R. Evid., forbids jurors from testifying about their deliberations. The rule also would foreclose such questioning of the felon-juror. *See Tanner v. United States*, 483 U.S. 107, 120-27 (1987). Perhaps he could be asked whether he honored his oath, followed the judge's instructions and executed faithfully his responsibilities. Suppose he answered in the affirmative. Why should he be believed? He already lied once about his status, and his position as a felon itself throws doubt on his veracity. That is why the rules allow witnesses to be impeached by their prior convictions. Fed. R. Evid. 609. Perhaps the hearing could

focus on why he deceived the court by not disclosing his status as a felon. But if he were represented, as he probably should be in view of 18 U.S.C. §§ 401, 1621, his counsel would likely advise him not to answer at all. *See, e.g., United States v. Vargas*, 606 F.2d 341, 344 (1st Cir. 1979). If he did respond, his answers would still suffer from a lack of trustworthiness.

What I have just written should not be taken to pertain to post-verdict inquiries into a juror's actual bias. As I have said, *North* approved such inquiries, and rejected Judge Winter's view for the Second Circuit that a juror's intentional nondisclosure on *voir dire* requires the conviction to be vacated if a truthful answer would have revealed a "view on the merits" that might have led to the juror's being struck either peremptorily or for actual bias. *Compare North*, 910 F.2d at 904-05, *with United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989). A felon's exclusion is not for bias, so neither case speaks to the situation here.

"Technically a juror who fails to meet the statutory qualifications is subject to challenge 'for *cause* ' while a juror who is biased is subject to challenge 'for *favor*.'" 2 C. WRIGHT, *supra*, at 361 (emphasis added). Though Professor Wright states that the "distinction [is] lost on the present generation of lawyers," *id.*, I would revive it here. A judge confronted with a challenge "for *favor* " must first determine which type of bias challenge he is facing: a challenge for "actual bias," or one for "implied bias." The former is "bias in fact," the latter is "conclusively presumed as a matter of law." *Wood*, 299 U.S. at 133. If the challenge is for actual bias, the trial judge must then determine whether the juror would in fact be unlikely to render impartial service. This is easy when the juror has admitted bias for or against a party, or has acknowledged some other reason why he would find it difficult to "render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A closer question arises when a juror professes ability to render fair service but

doubts nonetheless remain. *Compare Murphy v. Florida*, 421 U.S. 794 (1975), *with Irvin*, 366 U.S. at 728. Then the judge must look, so the cases indicate, at the facts giving rise to the inference and determine whether the juror can or "cannot realistically be expected to be impartial." 2 C. WRIGHT, *supra*, at 363. This process can be duplicated in a post-trial hearing: facts that would have come to light following a correct answer on *voir dire* can be developed, inferences from them drawn, and the possible existence and strength of the juror's bias determined. The district court then can make a judgment about whether a challenge for actual bias would have been made, and if so, granted. *See, e.g., United States v. North*, 716 F. Supp. 652, 655-56 (D.D.C. 1989); *cf.* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 24.6, at 1046 (2d ed. 1992). The facts of *North*, like the facts of *McDonough*, presented a question of "actual bias," not the more "exceptional circumstance [ ]" in which "the facts are such that bias is to be inferred." *North*, 910 F.2d at 904, *quoting McDonough*, 464 U.S. at 556-57 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring). *North*'s requirement of a "showing of actual bias," 910 F.2d at 905, would of course necessarily already be met when the facts constituted grounds for a challenge for implied bias.

When concealment has frustrated a challenge "for *cause*," however, a post-trial inquiry into actual bias lacks purpose, and in no way replicates what ideally would have happened before trial. In this respect it is similar to a challenge for implied bias, which leads to the *per se* exclusion of the veniremember. If a felon correctly completes the juror qualification form, he is not even summoned for jury duty. *See* Modified Plan for the United States District Court for the District of Columbia for the Random Selection of Grand and Petit Jurors (As Amended Through August 15, 1991), §§ E & F, at 4. If he slips through at that stage but is discovered before trial, presumably he is excluded without further ado, 2 C. WRIGHT, *supra*, § 383, not because of an inference, arising out of the identities of the

parties and other circumstances of a particular case, that he will be biased for one side or against the other, but rather because Congress determined that he ought not sit on *any* jury, determine the fate of *any* party, under *any* circumstances, in *any* case. That judgment reflects concern about maintaining the integrity of the jury, *cf.* section 1866(c)(5); H.R. Rep. No. 1076, *supra*, at 6, and with it, public confidence in verdicts. As Justice Kennedy recently put it, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law *by persons who are fair.*" *Powers v. Ohio*, U.S. 111 S. Ct. 1364, 1372 (1991) (emphasis added). Congress, I believe, adopted what is no doubt the traditional view—reflected elsewhere in our law, *see, e.g.*, Fed. R. Evid. 609(a), (c)—that felons are generally less trustworthy and responsible than others, and that they just cannot be counted on to be "fair."

This bar is not absolute. It applies only to felons whose "civil rights have not been restored," 28 U.S.C. § 1865(b)(5) (a determination made by each state), and thereby preserves some state influence on who may sit on federal juries. The District of Columbia does not appear to have a formal procedure for the restoration of a felon's civil rights, *see Williams v. United States*, 421 A.2d 19 (D.C. App. 1980). A felon may serve upon a jury in the District of Columbia courts when one year has passed since the completion of his "incarceration, probation, or parole," and when he has been certified pursuant to the District's jury system plan. D.C. Code Ann. § 11-1906(b)(2)(B). That a felon could be incompetent to serve on a jury one month but competent the next, or could be incompetent in a federal court in one state but competent in another, makes the ban seem somewhat arbitrary. But that is the necessary consequence of two determinations Congress made, and under *Wood* is allowed to make, 299 U.S. at 141, in writing the statute: that a felon is, at some point, sufficiently rehabilitated to have his civil rights restored, and that the fixing

of that point should be left to the states. *But cf.* Fed. R. Evid. 609(c) & advisory committee's note thereto. It is not a justification for us, once the rule has been broken, to throw up our hands and walk away.

Nor can it be said that a felon inevitably must be biased for the defendant and against the prosecution, so that in criminal cases, involving guilty verdicts, no difficulty is presented. First, I am disinclined to interpret a statute based on suppositions about felon psychology. Second, were I to indulge in such hypothesizing, I might see at least two reasons why a felon could be prejudiced towards a guilty verdict. He may have developed a callous cynicism about protestations of innocence, having no doubt heard many such laments while incarcerated. Or his desire to show others—and himself— that he is now a good citizen might lead him to display an excess of rectitude, both in his deliberations and in his vote. Given the constraints on what evidence can be developed at a post-trial hearing, *see supra* p. 640, a defendant is unlikely ever to be able to show how the felon-juror reached his conclusions, or how he may have influenced the other jurors. And unlike cases involving bias, there are no facts extrinsic to the jury's deliberations (other than the felon's status under section 1865(b)(5)) that are likely to reveal whether the reasons underlying the exclusion were implicated in a particular case.

That a felon has been unwilling to conform his conduct raises doubts about his capacity to honor the juror's oath, and to comply with the trial judge's instructions. These concerns intensify when, as occurred here, the felon deceives court and counsel about his status on *voir dire*. Such a person simply cannot be trusted to perform faithfully the solemn duty of sitting in judgment of others.

The reasons underlying the exclusion of felons from juries and the limitations on what evidence may be received mean that "[e]fforts to prove or disprove . . . prejudice from the record before us would be futile, and guesses whether the

outcome of the trial might have been different ... purely speculative." *Riggins v. Nevada*, U.S. 112 S. Ct. 1810, 1816 (1992). I would therefore decline to join *Ford*, 201 F.2d at 301, and *Currie*, 609 F.2d at 1194, in reading *Raub* and *Kohl* as requiring a defendant to show actual bias or prejudice in these circumstances.[16] In the bias context, the impanelling of a juror properly challenged for implied bias is reversible error. *See, e.g., Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1050-51 (4th Cir. 1984), so holding because the challenged juror held stock in the defendant corporation. *Cf. Peters v. Kiff*, 407 U.S. 493 (1972), in which six justices voted to reverse a conviction based on a verdict rendered by a jury that was "illegal in its composition," *id.* at 501 (Marshall,Douglas & Stewart, JJ., concurring), over a dissent strongly arguing that the defendant had in no way been prejudiced by the illegality. *Id.* at 507 (Burger, C.J., joined by Blackmun & Rehnquist, JJ., dissenting).

Rule 33 gives the district court the power to grant a motion for new trial "in the interest of justice," Fed. R. Crim. P. 33, and the Supreme Court has noted that such post-verdict inquiries are proper so long as they are conducted within the strictures imposed by Fed. R. Evid. 606. *Tanner*, 483 U.S. at 127. The above discussion establishes that it would be error not to exclude a felon challenged for cause at *voir dire*. When the right to bring that challenge was not relinquished but rather abrogated by the felon's concealment, a new trial should be granted. I express no opinion on the possibly related subject of

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[16] The state courts are split on the issue. *Compare Beasley v. State*, 39 Ala. App. 182, 96 So. 2d 693 (1957); *Tweedle v. State*, 153 Tex. Crim. 200, 218 S.W.2d 846 (1949); *State v. Hermann*, 283 S.W.2d 617 (Mo. 1955); *State v. Benson*, 235 Or. 291, 384 P.2d 208 (1963); *with State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966). *See generally Firestone v. Freiling*, 22 Ohio Op. 2d 356, 188 N.E.2d 91 (Ct.C.P.1963); *Stagg v. Stagg*, 96 Mont. 573, 32 P.2d 856 (1934); *Ex parte Bronson*, 158 Tex. Crim. 133, 254 S.W.2d 117 (1953).

post-conviction relief under 28 U.S.C. § 2255, other than to note that the scope of such proceedings is obviously narrower than direct appeal, and that the "cause and prejudice" standard applicable in § 2255 actions does not allow relief from a non-constitutional flaw "unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Addonizio*, 442 U.S. 178, 184-85 (1979), quoting *Hill v. United States*, 368 U.S. 424, 428 (1962). I would hold only that when a felon, excludable under 28 U.S.C. § 1866(c)(4) pursuant to the determination made by Congress in enacting section 1865(b)(5), has concealed his status on *voir dire* and served on a jury in a criminal case, the verdict must be vacated when the error is discovered before entry of judgment. The remand to the district court should be for a hearing limited to the question whether the juror was, in fact, covered by the terms of section 1865.[17]

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[17] The government in its Brief protests that there is no evidence that the juror's civil rights had *not* been restored. Brief for Appellee at 22. Though the formulation strikes me as somewhat inverted, the district court could address the issue on remand. As noted *supra* p. 642, the District of Columbia does not seem to have a formal procedure for the restoration of a felon's civil rights. The Fourth Circuit has concluded that some "affirmative act" is required in order for civil rights to be restored within the meaning of § 1865(b)(5). *United States v. Hefner*, 842 F.2d 731, 732 (4th Cir. 1988). I doubt the present case would present an occasion to resolve the question. The juror here was convicted on February 25, 1985, and sentenced to one year in jail with five years' probation. His probation therefore would not have expired until February 25, 1991 (or at the earliest February 25, 1990, if it ran concurrently). As noted *supra* p. 642, the D.C. jury statute renders the felon ineligible until one year after that date (February 25, 1992, or February 25, 1991). Defendants' trial was held in May of 1990, so this juror apparently would not have qualified under the D.C. statute, even if that were sufficient to satisfy the federal requirement.

B. SENTENCING ON THE BASIS OF ACQUITTED CONDUCT

The jury convicted Holloman of distributing cocaine base—the .199 grams sold to the undercover officer. Calculating Holloman's offense level in light of the .199 grams alone would, under the Sentencing Guidelines, fix his term of imprisonment at 10-16 months. The court computed his sentence differently. Although the jury acquitted Holloman of the possession-with-intent-to-distribute count, which dealt with the 12.72 grams of cocaine base Boney threw under the truck, the district court found, by a preponderance of the evidence, that Holloman possessed that cocaine too, and treated it as "relevant conduct" under § 1B1.3(a)(2) of the Guidelines. (Holloman does not contest the factual accuracy of the district court's findings.) The district court therefore added the cocaine involved in the distribution and possession counts—a total of 12.92 grams—to determine Holloman's offense level. This increased the sentencing range to 63-78 months. The court sentenced Holloman to 63 months. Holloman understandably complains that, despite being acquitted of the possession charge, his sentence was no less than if he had been convicted. As he sees it, the Guidelines do not permit this; but if they do, they violate the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments.[18] The government tells us that other courts of appeals have approved what occurred here.

In determining the base offense level, the Guidelines instruct the sentencing court to take into account "relevant conduct," which for drug offenses means "all ... acts ... that were part of the same course of conduct or common scheme or plan as the

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[18] I read Holloman's reference to the Fourteenth Amendment, by its terms not applicable to federal criminal trials, as an inelegant reference to the demands of Due Process which do apply to such cases. U.S. Const. amend. V.

offense of conviction." U.S.S.G. § 1B1.3(a)(2). The application notes to this section indicate that the Commission meant to include acts for which the defendant had not been convicted. U.S.S.G. § 1B1.3 application note 2; background commentary & 3. The weight of drugs involved in uncharged criminal conduct and in conduct underlying dismissed counts may therefore be added to the amount of drugs involved in the charge on which the defendant was found guilty. *United States v. Salmon*, 948 F.2d 776 (D.C. Cir. 1991); *see also United States v. Chaikin*, 960 F.2d 171, 174 (D.C. Cir. 1992); 1990 UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 9, citing cases. The Guidelines do not specifically mention acts underlying counts on which a defendant has been acquitted. But the language of Guideline § 1B1.3(a)(2), particularly the "all," is certainly broad enough to comprehend such acts. Sentencing judges generally are not restricted in the kind of information they may take into account. "No limitation shall be placed on the information concerning the background, character, and conduct of a person ... for the purpose of imposing sentence." 18 U.S.C. § 3661.

When it comes to sentencing under the Guidelines, all circuits agree that the government may prove relevant conduct by a preponderance of the evidence, rather than beyond a reasonable doubt. *See United States v. Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989); 1990 UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 9. *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986), holds that this standard of proof at sentencing satisfies due process. A not guilty verdict establishes only that the government has not proved each element of the offense beyond a reasonable doubt. It does not rule out the possibility that, more likely than not, the defendant engaged in the conduct. *See Helvering v. Mitchell*, 303 U.S. 391 (1938); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *see also Dowling v. United States*, 493 U.S. 342 (1990). As my colleagues point out, this difference between the standard of

proof at trial and sentencing has moved ten courts of appeals to conclude that under the Guidelines, sentencing judges may consider "misconduct despite the defendant's acquittal on charges arising out of that misconduct." *United States v. Fonner*, 920 F.2d 1330, 1333 (7th Cir. 1990). *See*, in addition to *Fonner*, *United States v. Coleman*, 947 F.2d 1424 (10th Cir. 1991); *United States v. Rivera-Lopez*, 928 F.2d 372 (11th Cir. 1991) (per curiam); *United States v. Duncan*, 918 F.2d 647 (6th Cir. 1990); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177 (2d Cir. 1990); United States v. Dawn, 897 F.2d 1444 (8th Cir. 1990); *United States v. Mocciola*, 891 F.2d 13 (1st Cir. 1989); *United States v. Isom*, 886 F.2d 736 (4th Cir. 1989); *United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989). Six of these cases sustained enhancements to a sentence. Five of the six involved 2-level enhancements, pursuant to Guideline § 2D1.1, for possession of a firearm during an offense. *Coleman*, 947 F.2d at 1428-29; *Duncan*, 918 F.2d at 652; *Rodriguez-Gonzalez*, 899 F.2d at 180-81; *Dawn*, 897 F.2d at 1449-50; *Mocciola*, 891 F.2d at 16-17. The defendants in each case had been acquitted of using a firearm in connection with a drug offense, 18 U.S.C. § 924(c). *See, e.g., Rodriguez-Gonzalez*, 899 F.2d at 179. The sixth case, *Isom*, upheld a 6- level enhancement (pursuant to Guideline § 2B5.1(b)(2) for operating a printing press) for a defendant convicted of dealing with counterfeit obligations, 18 U.S.C. § 473, after he had been acquitted on a charge of counterfeiting, 18 U.S.C. § 371. 886 F.2d at 737, 739. Of the four remaining cases, two involved upward departures, *Ryan*, 866 F.2d at 608-09; *Fonner*, 920 F.2d at 1332. One of the others—like this case—involved aggregation of a separate quantity of cocaine charged in a count on which the jury returned a not guilty verdict. *Rivera-Lopez*, 928 F.2d 372. One did not specify which situation it faced. *Juarez-Ortega*, 866 F.2d at 748-49. The one court of appeals to break with this pattern, *United States v. Brady*, 928 F.2d 844, 851 (9th

Cir. 1991), did so over a dissent by Chief Judge Wallace, *id.* at 855, and did not articulate any constitutionally-compelled reason for doing so. *Id.* at 852 n.14. *But see United States v. Rodriguez*, 741 F. Supp. 12, 13-14 (D.D.C. 1990), *aff'd*, 946 F.2d 127 (D.C. Cir. 1991) (table).

This widespread practice under the Guidelines comports generally with the system prevailing prior to the Guidelines. Judges in pre-Guidelines cases had "very broad discretion" to impose any sentence "within the statutory limits," and "could properly refer to ... evidence introduced with respect to crimes of which [a] defendant was acquitted." *United States v. Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972). *See United States v. Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990); *United States v. Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States ex rel. Goldberg v. Warden*, 622 F.2d 60 (3d Cir. 1980); *United States v. Bowdach*, 561 F.2d 1160, 1175-76 (5th Cir. 1977); *United States v. Cardi*, 519 F.2d 309, 314 (7th Cir. 1975); *United States v. Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973). This circuit had reached a similar result in at least one case, though it declined to adopt and follow *Sweig* to its ultimate limits. *United States v. Campbell*, 684 F.2d 141, 154 (D.C. Cir. 1982). Reviewing courts believed that a judge inevitably would be influenced by evidence he has heard already anyway. It seemed a better practice not to reverse a judge so influenced for candidly disclosing the reasons for the sentence. Pre-Guidelines courts also relied on the different standard of proof applicable at sentencing.

Although the Guidelines hedged in the courts' discretion to impose particular sentences, the Guidelines were intended to continue the practice of permitting sentencing courts to consider a wide array of information, *see* U.S.S.G. § 1B1.4; *see also* 18 U.S.C. § 3661.[19] Still, the statute creating the

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[19] Which reads:

No limitation shall be placed on the information concerning the

substantive offense of conviction sets the outer limit of permissible punishment. U.S.S.G. § 5G1.1. *See United States v. Ryan*, 866 F.2d at 609; *United States v. Mocciola*, 891 F.2d at 16. *But cf. United States v. R.L.C.*, 503 U.S. 291 (1992). In this case, Holloman faced a statutory maximum of 20 years' imprisonment for the distribution count on which he was convicted. 21 U.S.C. § 841(b)(1)(C). If this were a pre-Guidelines case, the sentencing court could have chosen the appropriate sentence by considering Holloman's conduct underlying the possession count even though the jury returned a verdict of not guilty. With the Guidelines in place the difference is that the sentencing court *must* consider such conduct if proved by a preponderance of evidence, and must render a sentence within the range made applicable by the inclusion of that conduct, unless there is reason for a departure. To this extent, the effect of the Guidelines as I interpret them is the same as that described in *McMillan:* the statute there did not create "a separate offense calling for a separate penalty; it operate[d] solely to limit the . . . court's discretion in selecting a penalty within the range already available to it," 477 U.S. at 84-87, 88.

Holloman argues that the Double Jeopardy Clause complicates the picture. *Ashe v. Swenson*, 397 U.S. 436 (1970), extended the principle of *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), that the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal." Finding a collateral estoppel component in the Double Jeopardy Clause, *Ashe* held that the Constitution prohibited a second prosecution for a different offense if the government would have to offer proof on an issue regarding

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background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. That section recodified 18 U.S.C. § 3577, enacted in 1970. *See* U.S.S.G. § 1B1.4 background.

which the jury in the first prosecution "grounded its verdict" of not guilty. 397 U.S. at 444 (internal quotation omitted). In this case the district court told the jury that the elements of the possession-with-intent- to-distribute offense were knowing possession of some type of controlled substance, quantity,[20] and a specific intent to distribute. 5/9/90 Tr. at 93-95. The court also instructed on both constructive possession and joint possession. *Id.* at 94. By convicting Boney on this count (but not Holloman), the jury demonstrated its belief that the stash found under the truck was of the necessary quantity and was not for personal use. "The jury could [not] rationally have found" that this stash of 12.72 grams of cocaine base was not for Boney's personal use but was for Holloman's. 397 U.S. at 445. Thus, if the verdict on this count was dictated at all by the evidence in the case, it could only have rested on a conclusion that Holloman did not possess the "stash."[21] Were the government to try Holloman tomorrow for any offense which included as an element possession of the stash, *Ashe* would bar its way. Holloman says that considering his possession of the stash as "relevant conduct" amounts to punishing him for something for which he was acquitted, which, he asserts, *Ashe* prohibits.

In light of the overwhelming agreement of the courts of appeals before and after the Guidelines, and the absence of any contrary indication from the Supreme Court, I agree that § 1B1.3(a)(2) of the Guidelines is not unconstitutional when applied in this manner. Holloman's argument entails the minor

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[20] This court has since made clear that the quantity of the drugs involved is relevant only to sentencing and is not an issue for the jury. *United States v. Patrick*, 959 F.2d 991, 996 n.5 (D.C. Cir. 1992). That does not resolve this case, for the dispute here is over *which* quantity of drugs Holloman may be sentenced for (*i.e.*, only the drugs he sold or also the drugs Boney held), not over weight.

[21] The district court judge did not agree with that verdict. 11/21/90 Tr. at 12-13.

premise that a defendant may be punished only for conduct of which the defendant has been found guilty beyond a reasonable doubt. If "punishment" means "plays any role in the setting of a sentence," *McMillan* puts the argument to rest—it allows sentences to be adjusted based on facts not proven at trial. 477 U.S. at 91-92. The distinction seems to be that the defendant is not being sentenced for the acquitted conduct. Rather, the constitutionally-permissible sentencing range is set by the statute defining the offense of which the defendant was convicted, while the actual sentence within that range is determined in part by reference to other information establishing, by a preponderance of the evidence, the defendant's involvement in other relevant conduct.

I recognize that this conceptual nicety might be lost on a person who, like Holloman, breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be "increased" if, at sentencing, the court finds him responsible for the same misconduct. That the Double Jeopardy Clause protects him from reprosecution on the acquitted count, or that his acquittal means that his maximum potential sentence will be determined solely on the basis of the count on which he was convicted is doubtless of little comfort. My analysis, and my colleagues', also rests somewhat uneasily with the "special weight" the Supreme Court has accorded acquittals in its Double Jeopardy jurisprudence. *See United States v. DiFrancesco*, 449 U.S. 117, 129-30 (1980), collecting cases; *see also Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874). If, as one commentator has suggested, and as the Court has indicated, *DiFrancesco*, 449 U.S. at 130 n.11, not guilty verdicts are given this special weight out of respect for the jury's prerogative to acquit in the teeth of overwhelming evidence of guilt, Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012-18 (1980); Westen & Drubel, *Toward A General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122-31, then

the Guidelines' formalizing the potential use of acquitted conduct in sentencing may have worked a significant erosion of the jury's dispensing power. On the other hand, the Court seems to have indicated that when an aspect of a verdict speaks only to the sentence a defendant may receive, and leaves open the question of guilt, the Double Jeopardy Clause does not limit the sentencing range available at a subsequent trial. *Cichos v. Indiana*, 385 U.S. 76 (1966); *see also* Westen, *supra*, 78 MICH. L. REV. at 1021-22 & n.66.

At any rate, I cannot disregard the Court's decision in *McMillan*, its broader implications, and the accumulated weight of twenty years' decisions from our sister circuits. The Guidelines clearly require, and *McMillan* clearly allows, sentencing courts to take account of uncharged conduct proven by a preponderance of the evidence. To bar the sentencing court from considering acquitted conduct that also can be so proven would be anomalous. The Supreme Court has never held, indeed so far as I am aware no appellate court has ever held, that the Double Jeopardy Clause forbids sentencing courts from looking at conduct underlying an offense on which the defendant was acquitted. The hard logic of the differing-burdens-of-proof analysis has been accepted by the Supreme Court in other contexts, as well as by ten other courts of appeals in this context. *See supra* p. 645. I agree that we should not reject it today, and so join the majority's holding that the use of conduct underlying an acquitted count as "relevant conduct" under § 1B1.3(a)(2) for purposes of sentencing does not violate the Double Jeopardy Clause.

UNITED STATES CONSTITUTION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

JURY SELECTION AND SERVICE ACT OF 1968, P.L. 90-274 CODIFIED AS AMENDED IN 28 UNITED STATES CODE

§ 1865. Qualifications for Jury Service

* * *

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

* * *

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

§ 1866. Selection and summoning of jury panels

* * *

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be

* * *

(3) excluded on peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, ...

* * *

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by exercise of diligence, the grounds therefore, whichever is earlier, the defendant may move to dismiss the indictment or to stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General discovered or could have discovered, by exercise of diligence, the grounds therefore, whichever is earlier, the Attorney General may move to dismiss the indictment or to stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

* * *

(e) The procedures prescribed in this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

* * *

§ 1869. Definitions

For purposes of this chapter—

* * *

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance to residence from place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as a juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable for more than one year and has not had his civil rights restored. The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service.

* * *

§ 1870. Challenges

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All challenges for cause or favor, whether to the array or panel or to individual jurors shall be determined by the court.

FEDERAL RULE OF EVIDENCE

Rule 606 Competency of Juror as Witness

* * *

(b) Inquiry into the validity of verdict or indictment. Upon an inquiry into the validity of the verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bar upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA LOCAL CRIMINAL RULE

Local Criminal Rule 24.2 (2001) Communication with a juror.
(previously D.D.C. Rule 115 (1990))

* * *

(b) *After trial.* After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of Court to speak with members of the jury after their discharge. Upon receiving such a request, the Court shall inform the jury that no juror is required to speak to anyone but that a juror may do so if the

juror wishes. If no request to speak with a juror is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the Court for good cause shown in writing. The Court may grant permission to speak with a juror upon such conditions as it deems appropriate, including but not limited to a requirement that the juror be examined only in the presence of the Court.